Atelier Condominium and Cooper Square Realty, as Joint Employers *and* Sebastain Christopher *and* Nazmir Alovic. Cases 02–CA–039459, 02–CA–039575, and 02–CA–040066

November 26, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On April 10, 2012, Administrative Law Judge Mindy E. Landow issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions, as explained below, to amend the remedy,[2] and to adopt the recommended Order as modified and set forth in full below.[3]

This case arises from an organizing campaign among the Respondent's building service employees in 2009. The judge found, and we agree for the reasons she gives, that during the course of that campaign the Respondent unlawfully interrogated employees about their union activities,[4] unlawfully threatened an employee with reprisals for supporting SEIU Local 32BJ (the Union), and unlawfully discharged employees Nazmir Alovic and Sebastain Christopher because of their union activities.[5]

The judge also correctly found that the Respondent violated the Act in 2010 by filing a state-court lawsuit against Christopher alleging, among other things, that Christopher, by then a former employee, had published libelous statements on the Internet accusing the Respondent of criminal conduct. That lawsuit was pending at the time of the judge's decision (and apparently remains pending today). As discussed below, we affirm the judge's findings that the Respondent's lawsuit was baseless as to Christopher and that he was named as a defendant in retaliation for his protected activity.

I. BACKGROUND

Respondent Atelier Condominium (Atelier) and Respondent Cooper Square Realty (CSR) operated a high-rise building in mid-town Manhattan consisting of luxury residential condominiums.[6] Sabrina Mehmedovic was the property manager of the building. Robert Moricone was the building's resident manager, working under Mehmedovic, until his death in July 2009. Daniel Neiditch was the president of Atelier's board of directors. In addition, Neiditch operated a real estate company, located in an office in the building, which brokered

[1] The Respondent has excepted to some of the judge's credibility findings regarding the unfair labor practices committed in 2009. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent's reimbursement of Christopher for legal costs and other expenses incurred in defending against its unlawful retaliatory lawsuit shall include interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

[3] We shall order the Respondent to compensate discriminatees Sebastain Christopher and Nazmir Alovic for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each of them, in accordance with our recent decision in *Don Chavas LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). In addition, we shall modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language, and we shall substitute a new notice consistent with the Order as modified and with *Durham School Services*, 360 NLRB No. 85 (2014).

[4] Although we agree that the Respondent engaged in unlawful interrogations, we do not rely on *Bloomfield Health Care Center*, 352 NLRB 252 (2008), enfd. mem. 372 Fed.Appx. 118 (2d Cir. 2010), a two-member decision cited by the judge for support. See generally *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

The judge found, and we agree, that Board of Directors President Daniel Neiditch unlawfully interrogated employee Christopher in January 2009 when, while the two were driving in Neiditch's car, Neiditch told Christopher that he knew Christopher wanted a union and that Neiditch and another Respondent official did not. Our concurring colleague would find that Neiditch's statement was neither a question nor designed to elicit information, but was merely a noncoercive expression of Neiditch's opinion, which cannot be found unlawful under Sec. 8(c) of the Act. We find these views unpersuasive. First, the Respondent's relevant exceptions challenge only the judge's crediting of Christopher over Neiditch; thus, the Respondent has waived the arguments asserted by our colleague. In any event, Neiditch's "statement" to Christopher was the type of statement that "begs a reply," and constitutes "an invitation . . . either to confirm or deny [its] truth." *Ready Mix, Inc*., 337 NLRB 1189, 1190 (2002). We find, moreover, for the reasons given by the judge, that Neiditch's "statement" was coercive in all the circumstances, thus rendering Sec. 8(c) inapplicable.

[5] At fn. 43 of her decision, in concluding that Christopher's discharge was unlawfully motivated, the judge relied in part on a statement Resident Manager Robert Moricone made to Christopher. The Respondent has excepted to the judge's reliance on Moricone's statement in light of Moricone's unavailability to testify due to his death prior to the hearing. We affirm the judge's reliance on this statement, although we note that there is sufficient evidence of unlawful motive without it.

[6] No exceptions were filed to the judge's finding that the two Respondents were joint employers with regard to the condominium building. Accordingly, references to "the Respondent" in this Decision refer to both unless otherwise noted.

the purchase, sale, and leasing of condominiums in the building.

In January 2008, the Respondent agreed to an informal settlement of unfair labor practice charges filed by the Union, which essentially required the Respondent to cease recognizing and otherwise supporting Local 670 of the United Food and Commercial Workers in the absence of majority support for that union among the Respondent's building service employees.[7] Subsequently, the Respondent rebuffed the Union's efforts to discuss representation of these employees; Atelier's board of directors apparently still preferred Local 670 due to its perceived lower costs to the Respondent.

In early 2009,[8] the building service employees began organizing in support of the Union. Employees Alovic and Christopher were prominent in this effort. As stated, we have affirmed the judge's findings that the Respondent resorted to unlawful interrogations and threats and unlawfully discharged Alovic and Christopher in its efforts to thwart the employees' organizing campaign.

On July 1, a group of condominium owners in the building filed a lawsuit in state court against Atelier Board of Directors President Neiditch, other members of the Atelier board, Property Manager Mehmedovic, Respondent CSR, and Neiditch's real estate company. This lawsuit accused the defendants of corruption, bribery, payoffs, and extortion related to an alleged conspiracy to manipulate the sale and leasing of condominium units in the building.

Resident Manager Moricone shot himself to death on the day the owners' lawsuit was filed. Within days, Internet postings addressed to the Atelier residents appeared on two websites discussing Moricone's suicide and the corrupt activities of Neiditch and Mehmedovic alleged in the owners' lawsuit.

On July 8, Neiditch sent an email to the building's residents responding to the Internet postings. He described them as the work of certain named condominium owners and unnamed "former employees," and he asserted that these individuals were themselves involved in illegal activities in the building. He characterized the Internet postings as lies, libel, and slander that damaged the Atelier's reputation and property values, among other things.

On July 29, Neiditch, Mehmedovic, and Moricone's estate filed a lawsuit in state court against two named building residents, four named Internet service providers, 20 anonymous "John and Jane Doe" defendants, and three recently discharged building service employees: Laura Qoku, Blerta Behluli, and discriminatee Christopher. The lawsuit alleged 15 counts of libel and one count of tortious business interference based on the Internet postings.[9] Shortly after this lawsuit was filed, the alleged defamatory postings were removed from the websites. On June 3, 2010, the trial judge dismissed the case when the plaintiffs' attorney failed to appear at a scheduled pretrial conference.

On June 8, 2010, Neiditch and Mehmedovic filed a new lawsuit, naming only the three former employees identified above and 10 anonymous "John Does" as defendants.[10] The 2010 lawsuit asserts essentially the same libel and tortious-interference allegations under the same 16 counts as the 2009 lawsuit. Thus, the lawsuit broadly alleges that all the defendants were responsible for publishing multiple false statements on the Internet accusing the plaintiffs of various criminal activities, including complicity in the death of Moricone. The allegations, however, do not attribute any particular role in posting the statements to any particular defendants. Nor do the allegations state that the postings were subscribed to by any defendant. Indeed, it is apparent from the complaint allegations that the postings were anonymous.[11] The lawsuit demands $190 million in compensatory and punitive damages.

Christopher answered the complaint pro se, denying the allegations and counterclaiming for $85 million, alleging malicious prosecution by the plaintiffs. At the time of the administrative law judge's decision in the present unfair labor practice—almost 2 years after the 2010 lawsuit was filed—the lawsuit was still pending, and neither pretrial discovery nor any other action had taken place.[12]

II. THE JUDGE'S FINDINGS REGARDING THE 2010 LAWSUIT

The judge found merit in the General Counsel's allegations that the Respondent's 2010 lawsuit against Christopher is factually and legally baseless, and that he

[7] This settlement agreement did not include a nonadmission clause.

[8] All dates hereafter are in 2009 unless otherwise noted.

[9] New York State Index No. 110783/2009.

[10] New York State Index No. 150122/2010.

[11] The record does not contain copies of the relevant website pages. The state court *complaint* quotes alleged excerpts from the websites. It is portions of those quotations that the judge set out in part II.E of her decision.

[12] The parties in the case before us have not informed us of any developments in the Respondent's lawsuit after the issuance of the administrative law judge's decision. We take administrative notice, however, that, as of the date of this Decision and Order, a website operated by the New York State Unified Court System, http://iapps.courts.state.ny.us/iscroll/index.jsp, states that no "request for judicial intervention" has been filed in the suit, meaning that no judge has been assigned to it.

was named as a defendant in retaliation for his protected participation in the 2009 union organizing drive and in the Board's investigation of unfair labor practice charges underlying the present case. Thus, the judge concluded that, with respect to Christopher, the 2010 lawsuit violated both Section 8(a)(1) and (4) of the Act. We agree that the lawsuit violates Section 8(a)(1), consistent with our discussion below.[13]

III. DISCUSSION

The Board has held that a reasonably based lawsuit, whether ongoing or completed, does not violate the Act, regardless of the motive for filing it.[14] By contrast, a lawsuit determined to be baseless is unlawful under the Act if the plaintiff's motive was to retaliate against protected rights.[15] Here, we conclude that the Respondent's lawsuit is baseless and, in turn, that it has a retaliatory motive.

A. The 2010 Lawsuit Is Baseless

A lawsuit is baseless "if 'no reasonable litigant could realistically expect success on the merits.'"[16] In applying this standard to a pending case, as here, we are guided by the Supreme Court's decision in *Bill Johnson's*, which held that the Board may enjoin an ongoing lawsuit only if it lacks a reasonable basis and was filed with a retaliatory motive.[17] The *Bill Johnson's* Court, noting that the "reasonable basis inquiry need not be limited to the bare pleadings," recommended that the Board "draw guidance from the summary judgment and directed verdict jurisprudence" in exercising its discretion to determine the lawfulness of an ongoing lawsuit.[18] The Board has done so in prior cases. For example, in *Milum Textile Services*, supra, the Board, after determining that an employer unlawfully filed a motion for a temporary restraining order against a union, remanded the case to the administrative law judge to determine the lawfulness of the employer's underlying defamation lawsuit against the union. The lawsuit had been voluntarily dismissed at the employer's request prior to the discovery process, and thus had not been litigated to completion. Consistent with *Bill Johnson's*, the Board described the General Counsel's evidentiary burden on remand:

> The General Counsel had to prove that the Respondent, when it filed its complaint or during the time before it voluntarily dismissed the action, did not have and could not reasonably have believed it could acquire through discovery or other means evidence needed to prove essential elements of its causes of action.

357 NLRB No. 169, slip op. at 7.

Here, the judge, following *Milum*, concluded that the Respondent's lawsuit was baseless. In short, she determined that there was no factual basis for alleging that Christopher was in any way responsible for any of the alleged libelous statements. In her analysis, the judge discredited Neiditch in light of his sparse, vague testimony at the unfair labor practice hearing concerning Christopher's role in the postings, and she credited Christopher's testimony denying any participation in the alleged libel. Moreover, in light of the Respondent's failure to substantiate its allegations, she inferred, first, that no documents existed that would implicate Christopher, and second, that the Respondent had failed to investigate whether he had actually played any part.

The Respondent argues that the judge erroneously relied on her credibility resolutions and related factual inferences to support her finding that the 2010 lawsuit is baseless. We agree that the judge erred in this regard. The Court in *Bill Johnson's* made clear that such findings exceed the permissible limits of the Board's authority to evaluate ongoing lawsuits protected by the First Amendment.[19] The Board, in turn, has clearly acknowledged these limitations set by the Court, and has declined "to weigh the credibility of witnesses" in retaliatory lawsuit cases.[20]

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[13] In threshold determinations, the judge found that Neiditch and Mehmedovic were agents of the Respondents in filing the 2010 suit, that the General Counsel's complaint was not barred by Sec. 10(b), and that the complaint raised no significant preemption or public-policy questions. We deny the Respondent's exceptions to these findings, for the reasons stated by the judge.

The General Counsel's complaint also alleged that the Respondent's lawsuit is unlawful as to former employees Qoku and Behluli. The General Counsel, however, did not pursue these allegations at the hearing, and the judge declined to consider them. No exceptions were filed to this determination.

Finally, as discussed below, we find it unnecessary to pass on whether the lawsuit violated Sec. 8(a)(4) of the Act as well.

[14] *BE&K Construction Co*., 351 NLRB 451 (2007) (*BE&K II*).

[15] *Milum Textile Services Co*., 357 NLRB No. 169 (2011) (motion for temporary restraining order against union's protected public communications found unlawful); *Allied Mechanical Services, Inc*., 357 NLRB No. 101 (2011) (lawsuit seeking damages due to protected job-targeting activities found unlawful), enf. denied 734 F.3d 486 (6th Cir. 2013).

[16] *BE&K II*, supra at 457 (quoting *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, 508 U.S. 49, 60 (1993)).

[17] *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). See *Ray Angelini, Inc*., 351 NLRB 206, 208–209 (2007).

[18] 461 U.S. at 744–745 and fn. 11.

[19] 461 U.S. at 744, 745–746.

[20] *Beverly Health & Rehabilitation Services*, 331 NLRB 960, 962 fn. 6 (2000).

We nevertheless agree with the judge's conclusion that the 2010 lawsuit lacks any reasonable basis as to Christopher. Under New York law, a plaintiff must establish five elements to succeed in a libel suit: (1) a written, defamatory statement of fact concerning the plaintiff; (2) the defendant's publication of the statement to a third party; (3) the nature of the defendant's fault, i.e., whether negligence or actual malice, depending on the plaintiff's status; (4) the falsity of the statement; and (5) the plaintiff's injury.[21] Consistent with *Milum*, the General Counsel may carry his burden of proof by "pointing out . . . that there is an absence of evidence to support" at least one of these elements.[22]

In the present case, the baselessness of the Respondent's suit turns on the second libel element: the defendant's publication of the statement. As the General Counsel contends, the evidence is insufficient to permit the Respondent to establish that there is a genuine dispute of fact as to whether Christopher published any of the alleged defamatory statements, and so its case against him necessarily fails.[23]

On that element, the General Counsel showed the following. Neiditch's July 8 email to the condominium residents, sent only days after the Internet postings appeared, effectively foreshadowed the libel allegations in the 2010 lawsuit. Neiditch accused "former employees" of being involved in the offensive Internet postings; Christopher, however, was not named, and the Respondent never articulated, then or since, any factual basis for believing he was involved. Likewise, the 2010 lawsuit alleges that a collection of 12 defendants—Christopher, two other named former employees, and 10 "John Does"—posted extensive defamatory material on the Internet, but not one of the 16 counts describes Christopher's role with respect to publication of any posted statement. None of the allegations avers that Christopher is identified in, or that his identity is discernible from, any of the postings. Further, the allegations, all denied in Christopher's answer to the complaint, are unsupported by any documentary evidence whatsoever. As noted, the record in the present case contains no hard copies of the postings as they appeared on the Internet, nor does the record contain any other documents that would even suggest, let alone substantiate, Christopher's responsibility for the alleged defamatory statements. In sum, the General Counsel has shown that there is a complete absence of evidence to support any allegation that Christopher published a defamatory statement, or to show any basis for the Respondent to have reasonably believed that it could acquire through discovery or other means evidence to establish publication by Christopher.

The Respondent's attempt to counter the force of the General Counsel's showing does not withstand scrutiny. The Respondent's "evidence" amounts to the following, as described by the administrative law judge:

> Neiditch testified that Christopher was named as a defendant in the lawsuit because: "we have reason to believe that he put up postings on the site." When asked what led to that conclusion, Neiditch stated, "Well, there was a posting up there with his name on it. And just [illicit] stuff that he was saying." When asked whether he had a copy of any such document, Neiditch replied, "Not on me, no." When asked where it would be, he replied, "It would have been on the site."[24]

To the extent that Neiditch's testimony even connects Christopher to a relevant website, there is no description of the content that he allegedly posted. Thus, Neiditch did not address whether (and if so, how) any such postings were related to the libelous statements alleged in the 2010 lawsuit. The Respondent offered no other relevant evidence, and it did not explain, in testimony, by affidavit, or otherwise, why such evidence (assuming it existed) was not available (for example, because it could be obtained only through pretrial discovery).[25]

In sum, viewing the evidence and any reasonable inferences to be drawn from it in the light most favorable to the Respondent,[26] the General Counsel established that the Respondent "did not have, and could not reasonably have believed it could acquire through discovery or other

[21] See, e.g., *Meloff v. New York Life Insurance Co.*, 240 F.3d 138, 145 (2d Cir. 2001); see also *New York Pattern Jury Instructions—Civil* PJI 3:34 (3d ed. 2013).

[22] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–323, 325 (1986); see also *Doona v. OneSource Holdings, Inc.*, 680 F. Supp. 2d 394, 399 (E.D.N.Y. 2010), and cases cited there.

[23] See *Murphy v. City of New York*, 59 A.D.3d 301, 874 N.Y.S.2d 407 (2009) (dismissal on summary judgment affirmed: among other things, plaintiff failed to identify person who made alleged defamatory statement); *Trakis v. Manhattanville College*, 51 A.D.3d 778, 859 N.Y.S.2d 453, 456 (2008) (same); *Schwegel v. Chiaramonte*, 4 A.D.3d 519, 772 N.Y.S.2d 379, 381 (2004) (same).

[24] Again, all allegedly defamatory postings were removed from the websites soon after the filing of the 2009 lawsuit—more than 2 years before Neiditch testified at the Board hearing.

[25] See Fed. R. Civ. P. 56(d); see also *Celotex Corp.*, supra at 326; *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1376 (7th Cir. 1997), cert. denied 522 U.S. 808 (1997); *Meloff v. New York Life Insurance Co.*, 51 F.3d 372, 375 (2d Cir. 1995); *Milum Textile Services*, supra, slip op. at 7.

[26] See, e.g., *Mihalik v. Credit Agricole Cheuvreux North America, Inc.*, 715 F.3d 102, 108 (2d Cir. 2013); *Doona v. OneSource Holdings*, supra at 400, and cases cited there.

means, evidence needed to prove"[27] a requisite element of its libel claims against Christopher: that he initiated, took some role in, or was in any conceivable way responsible for publication of any alleged defamatory posting.[28]

The final count in the Respondent's 2010 lawsuit alleges that Christopher and the other defendants engaged in "tortious interference with prospective business relations." More specifically, the Respondent avers that Neiditch's real estate brokerage involving Atelier's condominium units was damaged financially because of the alleged libelous statements described in the preceding 15 counts.[29] In the absence of any evidence substantiating Christopher's culpability for the alleged Internet statements, this dependent claim has no factual foundation.

In short, the Respondent's evidence in support of the complaint allegations against Christopher appears to be virtually nonexistent. Accordingly, we find that the Respondent did not have even "a colorable argument" in support of its claims against Christopher.[30] This meets the Board's definition in *BE&K II* of a baseless legal action: no reasonable litigant in the Respondent's position could realistically expect to succeed on the merits of its claims against Christopher.

B. The 2010 Lawsuit Is Retaliatory

In light of our finding that the Respondent's 2010 lawsuit lacks any reasonable basis in naming Christopher as a defendant, we consider whether the allegations against him were unlawfully motivated.[31] Relevant factors in that analysis include whether the lawsuit was filed in response to protected, concerted activity; evidence of the Respondent's prior animus toward protected rights; the lawsuit's baselessness; and the Respondent's claim for punitive damages.[32]

The Respondent's lawsuit does not indicate, on its face, that it was filed in response to protected activity. Instead, the lawsuit alleges that Christopher, among others, published defamatory Internet postings accusing the Respondent of criminal activity in the management of the condominium building. The alleged postings themselves, as described in the complaint, do not reference any activities protected under the Act.[33] Nevertheless, retaliatory motive may be established by circumstantial evidence.[34] And, here, the surrounding circumstances amply support a finding that the Respondent named Christopher as a defendant in the 2010 lawsuit because of his protected activity.

Christopher engaged in protected union activity in 2009, and it is undisputed that the Respondent was aware of it. The Respondent's unlawful interrogations and threat of reprisals to employees during the Union's organizing drive, as well as its previous assistance to UFCW Local 670, a minority union, are evidence of its animus against the Union and its supporters among the building-service employees. The Respondent's animus is also established by its unlawful discharges of Alovic and Christopher in June, within weeks of their participation in the presentation of the employees' prounion petition to the Respondent.

The baselessness of the Respondent's 2010 lawsuit also reveals its retaliatory nature. The Respondent first sued Christopher on July 29, 2009, a month after his unlawful discharge, asserting the same defamation claims against him as those in the 2010 lawsuit, filed on June 8.[35] Thus, by the time the Respondent filed the

[27] *Milum Textile Services*, supra, slip op. 7.

[28] Compare *Diamond Walnut Growers*, 312 NLRB 61, 68–69 (1993) (employer's libel suit in state court found baseless in the absence of any evidence that the union, a named defendant, took part in the alleged defamation), enfd. 53 F.3d 1085 (9th Cir. 1995).

[29] Under New York law, the elements of a successful claim of tortious interference with business relations are: a business relationship between the plaintiff and a third party; the defendant's interference with the relationship by wrongful or otherwise improper means—for example, by the tort of libel; and a resulting injury to the relationship. See, e.g., *Catskill Development, LLC v. Park Place Entertainment Corp*., 547 F.3d 115, 132 (2d Cir. 2008), cert. denied 556 U.S. 1166 (2009).

[30] *Milum Textile Services*, supra, slip op. at 7.

[31] The judge found the Respondent's lawsuit unlawfully motivated under an analysis combining independent allegations in the General Counsel's complaint: that the suit was in retaliation for Christopher's protected conduct during the 2009 organizing drive, and also for his protected participation in the Board's investigation of some of the unfair labor practice charges underlying the present case. We agree that the Respondent's filing and maintenance of the 2010 suit against Christopher was driven by a retaliatory motive, as discussed below. However, we find it unnecessary to consider the complaint's 8(a)(4) allegation because, if proved, it would have no material effect on the remedy for the unlawful suit. See, e.g., *Alexis Painting Co*., 342 NLRB 1065, 1065 fn. 4 (2004); *Benjamin Coal Co*., 294 NLRB 572, 572 fn. 2 (1989).

[32] See, e.g., *Milum Textile Services*, supra, slip op. at 3; *Allied Mechanical Services, Inc*., supra, slip op. at 10–11; *Diamond Walnut Growers*, supra at 69.

[33] Compare, e.g., *Milum Textile Services*, supra, slip op. at 6 (employer's motion for temporary restraining order against union's protected communications with customers was unlawfully motivated); *Allied Mechanical*, supra, slip op. at 14 (employer's suit claiming financial injury due to protected job-targeting activities was unlawfully motivated).

[34] *Allied Mechanical*, supra, slip op. at 11–12.

[35] We note that Christopher filed an unfair labor practice charge on August 26, 2009, contesting his discharge, and that the General Counsel issued a complaint against the Respondent on February 26, 2010, alleging the discharge as unlawful. Thus, the Respondent was aware of Christopher's action when it filed the 2010 suit against him.

present lawsuit, it had almost a year to gather evidence to substantiate its allegations against Christopher. Yet, as described above, the 2010 lawsuit was wholly unsupported as to Christopher when it was filed, and it remains so today. In those circumstances, we infer that naming Christopher as a defendant in the lawsuit, like the false reasons offered for his unlawful discharge in 2009, was a pretext to retaliate against him because of his protected activity.[36] Indeed, it appears that the 2010 lawsuit was merely an effort to renew and maintain a retaliatory plan against Christopher that the Respondent initiated with his June 2009 unlawful discharge.[37]

Finally, we find that the Respondent's retaliatory motive is shown by its claim for damages of $190 million in the 2010 lawsuit ($12 million for each libel count and $10 million for alleged business interference). These claims were characterized in the Respondent's 2010 complaint as both compensatory and punitive, without differentiation, with no attempt—then or since—to justify the amount of damages alleged.

The Board has previously found that punitive damage claims can be evidence of retaliatory motive.[38] Given the size of each claim of injury here, each of which included punitive damages, and the fact that the alleged defamatory Internet postings were removed from the websites soon after the 2009 lawsuit was filed, we infer that these unsubstantiated claims are further evidence of the unlawful motive behind the Respondent's allegations against Christopher.

For all of these reasons, we find that the defamation allegations against Christopher were motivated by a desire to retaliate against him because of his protected conduct. In particular, we find that naming Christopher in the lawsuit was an effort to burden him with the costs of litigation.[39]

IV. CONCLUSION

In sum, we find that the Respondent's 2010 lawsuit lacks any reasonable basis as it applies to Christopher; that its filing was, and its continued maintenance is, unlawfully motivated; and that it violates Section 8(a)(1).[40]

ORDER

The National Labor Relations Board orders that the Respondent, joint employers Atelier Condominium and Cooper Square Realty, New York, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively questioning employees about their union support or activities or the union support and activities of other employees.

(b) Threatening employees with unspecified reprisals for their union or protected concerted activities.

(c) Discharging or otherwise discriminating against employees for supporting Local 32BJ, SEIU or any other union.

(d) Filing and maintaining any lawsuit that lacks a reasonable basis and is motivated by an intent to retaliate against employee activity protected by Section 7 of the Act.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Nazmir Alovic and Sebastain Christopher full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Nazmir Alovic and Sebastain Christopher whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Nazmir Alovic and Sebastain Christopher for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay

[36] See, e.g., *Rood Trucking Co*., 342 NLRB 895, 897–898 (2004) (pretextual nature of a respondent's asserted reasons for taking action can be substantial evidence of animus).

[37] Sec. 10(b) bars an allegation that the 2009 suit violated the Act. However, this does not preclude our relying on it as evidence of illicit motive. See, e.g., *Meritor Automotive, Inc*., 328 NLRB 813 (1999); see also *Lodge Local No. 1424 v. NLRB*, 362 U.S. 411, 416–417, 422 (1960) (pre-Sec. 10(b) events may be used to shed light on a properly charged unfair labor practice).

[38] See, e.g., *Operating Engineers Local 520 (Alberici Construction)*, 309 NLRB 1199, 1200 (1992), enf. denied 15 F.3d 677 (7th Cir. 1994); *Summitville Tiles*, 300 NLRB 64, 66 (1990).

[39] See *Milum Textile Services*, supra, slip op. at 6 fn. 22; *Allied Mechanical Services*, supra, slip op. at 11.

[40] Our concurring colleague agrees that the Respondent's lawsuit was both baseless and retaliatory. In his view, however, we impermissibly rely on the baselessness of the Respondent's suit, demonstrated in part by its unsubstantiated claims for punitive damages, as evidence of the Respondent's retaliatory motive. Our approach is fully consistent with Board precedent, as we have explained, and with the Supreme Court's jurisprudence. See, e.g., *Allied Mechanical Services*, supra, slip op. at 11–12 (rejecting dissenting view). In any case, we would reach the same result here relying solely on the evidence of retaliatory motive relied on by our colleague.

awards to the appropriate calendar quarters for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Nazmir Alovic and Sebastain Christopher, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(e) Ensure that a motion is filed for leave to withdraw the allegations against Sebastain Christopher in its lawsuit instituted in the Supreme Court of the State of New York, Daniel Neiditch and Sabrina Mehmedovic v. Laura Qoku, Blerta Behluli, Sebastain Christopher and John Does 1 through 10, Index Number 150122/2010, and compensate Christopher for any costs incurred in the defense of those allegations, in the manner set forth in the remedy section of the judge's decision as amended in this Decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[41] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2009.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 26, 2014

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Kent Y. Hirozawa, Member

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Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring.

I join my colleagues' unfair labor practice findings in most respects.[1] I write separately regarding the finding, with which I concur, that the Respondent violated Section 8(a)(1) of the Act by naming Sebastain Christopher in its 2010 state-court libel and tortious interference lawsuit, which alleged that Christopher and 12 other individuals (10 of whom are "John Does") posted anonymous libelous statements on a website critical of Neiditch and Mehmedovic.[2]

In 1983, the Supreme Court noted that the Board had a "checkered history" when addressing its authority to issue "a cease-and-desist order to halt an allegedly retali-

[41] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] I agree that the Respondent coercively interrogated employees, but I disagree that the January 2009 conversation between Atelier Condominium Board of Directors' President Daniel Neiditch and employee Sebastain Christopher was an interrogation at all, let alone an unlawfully coercive one. In that incident, Neiditch and Christopher were driving in Neiditch's car when Neiditch told Christopher that he knew Christopher wanted a union and that neither Neiditch nor Property Manager Sabrina Mehmedovic wanted one. Neiditch did not ask Christopher any question, and his statement was not phrased to elicit information about Christopher's union activities, the organizing campaign, or the identities of other union supporters. Rather, Neiditch expressed an opinion about unions, and his statement contained neither threat of reprisal or force nor promise of benefit. Accordingly, under Sec. 8(c) of the Act, it did not constitute an unfair labor practice.

Aside from the January 2009 alleged interrogation and the *Bill Johnson's* issue, discussed below, I join my colleagues' other unfair labor practice findings for the reasons stated in the judge's decision.

[2] Like my colleagues, I disclaim any reliance on the judge's credibility determinations and related factual inferences in analyzing whether the lawsuit was objectively baseless, and I do not reach the allegation that the Respondent also violated Sec. 8(a)(4) of the Act. In adopting the judge's finding that Mehmedovic and Neiditch were acting as agents of the Respondent when the lawsuit was filed, I do not rely on the allegations in the state-court complaint.

atory lawsuit filed by an employer in a state court." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 (1983). In *Bill Johnson's*, the Supreme Court stated: "The right to litigate is an important one, and the Board should consider the evidence with utmost care before ordering the cessation of a state-court lawsuit." Id. at 744. The Court held that the Board may *not* enjoin any "well-founded lawsuit," even if the lawsuit was motivated by a desire to retaliate against the defendant for exercising NLRA-protected rights. Id. at 743.

Consequently, in cases such as this, the Board has several challenges. First, we have no jurisdiction over non-NLRA litigation that, as in the instant case, involves pending state-law claims as to which the Board has no expertise.[3] Second, not only must we evaluate whether the lawsuit is motivated by a desire to retaliate against the exercise of rights protected by our statute, we must construe non-NLRA legal requirements to determine whether the lawsuit "lacks a reasonable basis in fact or law." Id. at 748. Third, our evaluation of whether the litigation is "baseless" must end if there are "genuine issues of material fact or law," which derives from jurisprudence regarding summary judgment and directed verdict determinations. Id. at 745 fn. 11. Fourth, the Supreme Court has stated that the Board may not "usurp the traditional fact-finding function of the state-court jury or judge." Id. at 745 (footnote omitted). Thus, if there is a genuine dispute as to material facts, issues of law, or a "mixed question of fact and law," unless the plaintiff's position is "plainly foreclosed as a matter of law or is otherwise frivolous, the Board should allow such issues to be decided by the state tribunals if there is any realistic chance that the plaintiff's legal theory might be adopted." Id. at 746–747.

Our task here is further complicated by the Respondent's apparent failure to have commenced discovery in its state-court lawsuit. In other circumstances, the failure to have undertaken discovery might preclude a finding that the plaintiff's non-NLRA allegations are baseless because discovery might be necessary to uncover support for one or more allegations.[4] Cf. Fed. R. Civ. P. 56(f). However, under the circumstances of this case, I agree that the apparent failure to engage in discovery does not preclude our finding that the Respondent's 2010 claims against Christopher are baseless.

Respondent's state-law defamation lawsuit alleges that Christopher was responsible for Internet postings that constituted libel. At the hearing before our judge, Christopher denied that he was involved in the postings. As to this issue, I agree with my colleagues that the Respondent failed to present evidence sufficient to create a genuine issue of material fact. *Bill Johnson's*, 461 U.S. at 746 fn. 12. At the Board hearing, the Respondent's witness, Neiditch, testified that Christopher was named a defendant because "we have reason to believe that he put up postings on the site." On further questioning, he said that there was "a posting" with Christopher's name on it. Neiditch then referred to alleged illicit "stuff" that Christopher "was saying." Neiditch did not specify what was stated in the claimed posting that mentioned Christopher's name. Neiditch did not generally state what was mentioned in the claimed posting.[5] Nor did Neiditch explain what was libelous about the posting or the "stuff" Christopher had been saying. Moreover, although the record does not preclude the possibility that some document might implicate Christopher, no such document is part of the record before the Board, and Neiditch essentially admitted that he did not have any documentary evidence of any statement posted on the Internet that mentioned Christopher by name. Asked if he had a copy of any such statement, Neiditch answered, "No, not on me." Asked where such a statement would be, he answered, "It would have been on the website." As noted previously, all allegedly defamatory postings were removed from the website soon after the filing of the 2009 lawsuit. Even if the record raised a genuine issue as to whether Christopher posted some unspecified statement on the Internet, I agree Respondent has not established there is a *material* question concerning the issue of defamation, because the record does not contain any evidence reasonably suggesting such an Internet statement was false (a prerequisite to any finding of libel) and defamatory.

Although it appears Respondent has not conducted discovery in the four years or so that have elapsed since the lawsuit's commencement,[6] Respondent does not claim that it lacked a reasonable opportunity to engage in

[3] I have elsewhere expressed my disagreement when the Board has failed to recognize the limitations on its authority to exercise jurisdiction over non-NLRA claims and issues. See *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part) (dissenting from finding that employer violated Sec. 8(a)(1) by entering into agreements waiving class-type treatment of non-NLRA claims, and from awarding fees in non-NLRA litigation resulting from employer's meritorious motion to dismiss).

[4] In *Bill Johnson's*, the respondent-plaintiff had engaged in discovery in connection with the state litigation by the time of the Board hearing. *Bill Johnson's Restaurants, Inc.,* 249 NLRB 155, 165 (1980).

[5] In its brief, the Respondent makes representations about Neiditch's testimony that are not supported by the hearing transcript.

[6] The Respondent did not except to the judge's finding that, approximately 2 years after the state lawsuit was filed, it had taken no action to prosecute the suit or commence discovery.

discovery. Nor does Respondent claim that the lack of discovery has prejudiced its defense to the allegation that the lawsuit against Christopher violates Section 8(a)(1) of the Act.[7] In these circumstances, I believe the lack of discovery does not preclude a finding that the 2010 lawsuit as to Christopher is "lack[ing] a reasonable basis in fact or law."[8]

Regarding the second stage of the *Bill Johnson's* test, I also agree with my colleagues that the record supports a finding that Respondent's defamation lawsuit named Christopher in retaliation against Christopher's protected union activity. However, I disagree with my colleagues' reliance on the baselessness of the lawsuit as evidence of retaliatory motive. The Supreme Court in *Bill Johnson's* held that "[r]etaliatory motive *and* lack of reasonable basis are *both essential prerequisites* to the [NLRB's] issuance of a cease-and-desist order against a state suit." 461 U.S. at 748–749 (emphasis added). Because retaliatory motive and baselessness are separate prerequisites, the majority cannot properly find that baselessness satisfies both. Here, I agree with former Member Hayes that reliance on baselessness to prove a retaliatory motive is impermissible under *Bill Johnson's*. See *Allied Mechanical Services*, 357 NLRB No. 101, slip op. at 15 (2011) (Member Hayes, dissenting). Even if baselessness is relied on among other factors to infer retaliatory motive, this "diminishes the quantum of evidence required to establish a violation of the Act, and thereby subverts the purpose of requiring a subjective component, which is to provide constitutionally protected breathing room for even unmeritorious lawsuits." *Milum Textile Services Co.*, 357 NLRB No. 169, slip op. at 14–15 (2011) (Member Hayes, dissenting in part).

Unlike my colleagues, I also believe the Board cannot properly infer a retaliatory motive from the amount of damages sought in an employer's state-court lawsuit. Many factors may be responsible for the amount of damages claimed in a lawsuit, including legal advice obtained by the employer. Additionally, the evaluation of what constitutes reasonable damages under state law is especially foreign to the Board's expertise, and any Board determination in this area is unlikely to be afforded deference.[9] It is true that the amount of damages sought in a state-court action may be evidence of a plaintiff's ill will towards the defendant. However, with or without punitive damages, all types of litigation typically involve ill will in abundance. Consequently, I believe a claim for punitive damages—though excessive and indicative of ill will—cannot fairly be regarded as evidence of a retaliatory motive in violation of Section 8(a)(1).[10] However, the Respondent's other unfair labor practices in the instant case—in particular, the unlawful threats against those involved in union organizing, the coercive interrogation of Alovic concerning Christopher's union activity, and the retaliatory termination of Alovic and Christopher shortly before the filing of the first lawsuit in 2009 (which also named Christopher)—and its prior support of a minority union (UFCW Local 670) support a finding that the Respondent's state-court lawsuit against Christopher was motivated by a desire to retaliate against him because he engaged in protected activities on behalf of SEIU Local 32BJ.

For these reasons, I concur.

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[7] The Respondent is content to rest on its arguments that it did not file the lawsuit, which my colleagues have properly rejected, and that Neiditch's testimony is sufficient to establish a genuine issue of material fact, which I believe is also without merit.

[8] *Bill Johnson's*, 461 U.S. at 748; see *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1376 (7th Cir. 1997) (holding that, where "plaintiff in a state lawsuit provides no evidentiary basis for that suit and fails to describe what evidence he expects to obtain through discovery and to explain why he has not been able to obtain that evidence, the Board properly may enjoin the prosecution of that suit prior to discovery"), cert. denied 522 U.S. 808 (1997).

[9] Obviously, the Board's primary remedial role is to devise remedies pursuant to the NLRA, which makes no provision for punitive damages. Even regarding the remedies available under the Act, the Supreme Court has held that the Board must only order remedial and not punitive measures. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940); *Consolidated Edison Co. v. NLRB,* 305 U. S. 197, 235–236 (1938); *NLRB v. Pennsylvania Greyhound Lines,* 303 U. S. 261, 267–268 (1938). It is also relevant that the Board, in 1940, abolished its then-existing Division of Economic Research, and Sec. 4(a) of the Act prohibits the Board from appointing personnel to engage in "economic analysis." See generally 93 Cong. Rec. 6661, reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act 1577 (June 6, 1947) (analysis of H.R. 3020); John E. Higgins, Jr., *Labor Czars—Commissars—Keeping Women in the Kitchen—The Purpose and Effects of the Administrative Changes Made by Taft-Hartley*, 47 Cath. U. L. Rev. 941, 951–952 (1998). Therefore, the assessment of potential damages available under state law—especially punitive damages having the purpose, in part, to deter violations of state law—is especially foreign to the Board's competence. Cf. *Republic Steel*, 311 U.S. at 12 (the Board is not "free to set up any system of penalties which it would deem adequate" to "have the effect of deterring persons from violating the Act").

[10] See *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.,* 508 U.S. 49, 69 (1993) (Stevens, J., concurring in judgment) ("We may presume that every litigant intends harm to his adversary.").

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities or the union support and activities of other employees.

WE WILL NOT threaten you with unspecified reprisals for your union or concerted protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 32BJ, SEIU or any other union.

WE WILL NOT file or maintain any lawsuit that lacks a reasonable basis and is motivated by an intent to retaliate against employee activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Nazmir Alovic and Sebastain Christopher full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Nazmir Alovic and Sebastain Christopher whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL compensate Nazmir Alovic and Sebastain Christopher for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each of them.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Nazmir Alovic and Sebastain Christopher, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL ensure that a motion is filed for leave to withdraw the allegations against Sebastain Christopher in the lawsuit instituted in the Supreme Court of the State of New York, Daniel Neiditch and Sabrina Mehmedovic v. Laura Qoku, Blerta Behluli, Sebastain Christopher, and John Does 1 through 10, Index Number 150122/2010, and WE WILL compensate Christopher for any costs incurred in the defense of those allegations, plus interest.

ATELIER CONDOMINIUM AND COOPER SQUARE REALTY

The Board's decision can be found at www.nlrb.gov/case/02-CA-039459 or by using the QR

code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Suzanne Sullivan and *David Gribben, Esqs.,* for the Acting General Counsel.

Scott Wich and *Robert Sparer, Esqs. (Clifton, Budd & DeMaria),* of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

MINDY E. LANDOW, Administrative Law Judge. Based on charges filed by Sebastain Christopher (Christopher) in Case 02–CA–039459 and in Case 02–CA–040066 on August 26, 2009, and August 12, 2010, respectively, and by Nazmir Alovic (Alovic) in Case 02–CA–039575 on November 10, 2009, an order consolidating complaint, consolidated complaint and notice of hearing (complaint) issued on June 10, 2011. The complaint alleges that Atelier Condominium and Cooper Square Realty as joint employers (Atelier, CSR, and collectively as Respondent) violated Section 8(a)(1)(3) and (4) of the Act by: interrogating employees about their activities on behalf of Local 32BJ, SEIU (Local 32BJ or the Union) and the union activities of others, threatening employees with unspecified reprisals if they supported the Union; discharging Alovic and Christopher and filing and maintaining a baseless and retaliatory lawsuit naming discharged employees, including Christopher, as a defendant. Respondent filed an answer denying the material allegations of the complaint and asserting certain affirmative defenses.[1] A hearing was held before me on November 15–18, 2011, in New York, New York.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel[3] and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Atelier maintains an office and principal place of business at 635 West 42nd Street, New York, New York, and operates a residential building condominium at that address. Annually, Respondent Atelier derives gross revenues in excess of $500,000 and purchases and receives at its 42nd Street location goods and supplies, including fuel oil, valued in excess of $50,000, directly from suppliers located outside the State of New York. Respondent CSR maintains an office and principal place of business at 6 East 43nd Street, and is engaged in the operation of managing residential properties. At all material times, Atelier and CSR have been parties to a contract providing that CSR act as the managing agent for Atelier at its building located at 635 West 42nd Street. Respondent admits, and I find that Respondent Atelier has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent has also admitted, and I find that the Local 32BJ is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

Atelier Condominium is a luxury high-rise building which was developed by the Moinian Group as sponsor and opened for occupancy in 2007. CSR provides the building with staff and management services. The parties have stipulated that CSR effectively recommends discipline of and supervises the building service employees at Atelier; that during the period from March to July 2009 Atelier determined wage rates for employees at that location and that CSR and Atelier determine essential terms and conditions of employment and share control over labor relations in the building.

Robert Moricone was selected to serve as Atelier's resident manager and he recruited both Christopher and Alovic, who had worked with him at other building locations, to come to work at the condominium. The two served primarily as doormen, although Alovic also worked as concierge on Sundays. Mehmedovic, who has worked for CSR since 2007, has served as property manager at the Atelier since April 2008. Moricone served as resident manager until his death in July 2009. In February 2008, the Atelier board of managers (the board)[4] was formed and Daniel Neiditch has served as its president for the past 5 years. Neiditch is also an owner of a condominium in and rents a residential unit in the building. He operates a real estate company, called River to River Real Estate, from an office in the Atelier as well. This real estate company acts as broker in purchases, sales, and rentals in the building.

[1] In particular, Respondent asserts as follows: (1) the complaint fails to state a claim upon which relief may be granted; (2) the charging parties engaged in unprotected conduct; (3) the allegations in the complaint are barred by laches; and (4) General Counsel's pursuit of portions of the complaint is contrary to Federal law and an abuse of process.

[2] The parties' joint motion to admit Jt. Exh. 1, consisting of a series of stipulations reached at the hearing, is hereby granted. In addition, counsel for the Acting General Counsel's unopposed motion, as set forth at various points in his posthearing brief, to amend the transcript primarily to correct the names of witnesses and other individuals mentioned in the record, is hereby granted.

[3] Referred to the General Counsel.

[4] At various times this body is also referred to in the record as the "Board of Directors."

CSR provides similar real estate management services to numerous buildings and many of these facilities have contracts with Local 32BJ. At some point in 2007, an assent agreement was sent to the Atelier by the Realty Advisory Board on Labor Relations (RAB), which represents employers in labor relations matters and negotiates with Local 32BJ on their behalf. This assent agreement was located by Mehmedovic in the office files, although she offered no testimony about its significance. The agreement, by its apparent terms, sets the wage rate for the building superintendent and additionally appears to assent to the terms of the Master Agreement between the RAB and Local 32BJ.[5]

Notwithstanding any apparent agreement with the RAB, building service employees began organizing for Local 32BJ shortly after they were hired. Local 32BJ filed unfair labor practice charges against the Atelier, the Moinian Group, and CSR and, in January 2008, these charges were settled pursuant to an informal settlement agreement.[6] Among other things, the respondents there agreed to refrain from: recognizing Local 670, UFCW as the exclusive collective-bargaining representative of its employees and entering into a collective-bargaining agreement with that union; denying Local 32BJ access to building service employees while providing such access to Local 670; threatening employees with discharge and unspecified reprisals for activities on behalf of and support for Local 32BJ; promising employees benefits if they joined Local 670 and assisting Local 670 in other ways, as outlined therein. The respondent also agreed to withdraw and withhold recognition from Local 670 unless that union represented an uncoerced majority of building service employees; to cease giving effect to its collective-bargaining agreement with Local 670 and to provide Local 32BJ with the same access to employees provided to Local 670.

In May 2008, CSR received a notice from Local 32BJ that it wanted to meet to discuss organizing the building service employees. CSR Vice President Marc Kotler forwarded this request to members of the Atelier board and recommended that the request be forwarded to the RAB for their direction on how to respond to the Union. Board member Jared Lacorte replied as follows:

> This is not unexpected and infact [sic] was fortunately budgeted for by Marc [Kotler] as 32BJ has higher compensation costs. The employees are free to choose their union and we should not stand in their way.

Kotler replied:

> Yes, I have taken 32BJ rates and benefits into account in the revised budget that I am working on and should be able to distribute today. I would not recommend that the full Board meet with the union representative. In my experience it is best to work in small groups when meeting with them. You may want to have one or two board members and myself meet with the union representative in order to discuss this [sic] issues at hand. We will then need to consult with the Realty Advisory Board and provide them with what terms we would like in place to benefit the condo and have the RAB craft and negotiate these terms into the Assent Agreement with the union.

As reflected in the minutes from an Atelier board of managers meeting held on June 8, 2008, Kotler suggested that Board President Neiditch meet with Local 32BJ representatives to discuss an employee contract. Neiditch "inquired the status with Local 670 since they were less expensive and funds would be saved." Kotler informed the board that "they were not interested," and Neiditch agreed to meet with Local 32BJ.

As reflected in the minutes of a board meeting held in November 2008, Kotler inquired if the Board had decided on a contract with Local 32BJ. Board member Jason Gohari [7] suggested signing a contract with Local 670 as it was less expensive and Kotler reported that Local 670 will not get involved with the Atelier. The board the discussed current employee wages and benefits and decided to hold off on signing a union contract at that time.

The above-noted documents were the only two sets of minutes produced by Respondent which were responsive to the General Counsel's subpoena for relevant documents.[8] Under questioning by the General Counsel, Dov Kerner, the custodian of the records produced by Respondent, testified that he searched the minute book maintained by Respondent and produced those minutes which referred to Local 32BJ. Thus, the record before me contains no evidence of further discussion of matters involving the Union at any subsequent meeting of the Board.

The building service employees began organizing again for Local 32BJ in March 2009. Alovic contacted Local 32BJ Representative Kevin Starvis and complained that employees at the building had been waiting 2 years for a union. Starvis told Alovic that the prior cards were stale and he would provide new authorization cards to distribute. Over the course of the next 2 weeks, Alovic and Christopher both began soliciting support among their coworkers by speaking about issues such as pension, healthcare, better wages, and job security. Once over 50 percent of the building service employees signed cards, Christopher obtained from the Union and distributed a petition

[5] Respondent sought to introduce in to evidence another document, entitled "Application for Residential Membership" which Mehmedovic claims to have also located in her office files. The General Counsel objected on the basis that such a document would have been subject to the subpoena duces tecum issued to Respondent, and had not been produced. Mehmedovic could offer no testimony to authenticate this document or explain its relevance to any issue regarding the representation of employees at the Atelier. Accordingly, I directed that it be placed in the rejected exhibit file.

[6] As the General Counsel notes, this informal settlement agreement does not contain a nonadmission clause.

[7] Gohari was the sponsor's representative on the board.

[8] The General Counsel subpoenaed, in relevant part: "Copies of all documents, including but not limited to emails, written correspondence, memoranda, notices, written minutes of meetings, and petitions that refer to Local 32BJ, SEIU." As noted above, only two sets of minutes were produced.

to employees. The Union planned to present this petition to the building's board of managers. Thus, in the latter part of May, Christopher solicited employees to sign a petition in support of the Union.

On June 3, Union Vice President Kyle Bragg sent the following letter to the Atelier Board:

> As you can see from the enclosed petition, the building service workers employed at The Atelier, located at 635 W. 42 Street in Manhattan, are organizing with Local 32BJ of the Service Employees International Union.
>
> We would like to meet with you to discuss a process for determining the wishes of the employees. This is not a demand for recognition.

The letter goes on to request that the Board contact him to set up a meeting. Attached is a petition, signed by 13 employees, including Christopher and Alovic, which states the following:

> We the workers of the Atelier, at 635 West 42nd Street, deserve the same benefits as the vast majority of residential building workers in New York City. We work hard to make the Atelier a top quality residence but do not have any pension or 401(k) benefits. Our organizing efforts with SEIU Local 32BJ are the result of our own free choice and we ask you to respect that choice. We stand together in our desire for better conditions.

As noted above, Respondent produced no minutes of the board of managers which referenced or discussed this demand for recognition although such documents would clearly be within the scope of the subpoena duces tecum issued by the General Counsel. Moreover, neither Neiditch nor Mehmedovic, the two Employer representatives to testify here, offered any testimony regarding any response Atelier or CSR may have had to this petition or, in fact, any testimony about it at all. When Mehmedovic was asked by Respondent's counsel whether she was familiar with Local 32BJ she offered the following response: "My husband is a member for the last 25 years. My father was a member for many years . . . my brother, pretty much I grew up with it. I went to their office. I go for medical, dental, so I'm very familiar with them." She also acknowledged that CSR manages numerous buildings which have collective bargaining agreements with the Union. From comments made during Respondent's opening statement and the parties' joint stipulation entered into evidence after the record closed, it appears that Respondent and Local 32BJ are now parties to a collective-bargaining agreement and that this occurred at some point in or after July 2009.

B. Alleged 8(a)(1) Violations

In the complaint, the General Counsel has alleged various independent violations of Section 8(a)(1) of the Act. With regard to Mehmedovic, it is alleged that in March she threatened employees with discharge if they supported the Union, that in late April she interrogated employees about their and other employees' support for the Union and in mid to late June interrogated employees about their and other employees support for the Union.

The complaint further alleges that in about March Neiditch threatened employees with unspecified reprisals if they supported the union and interrogated employees about the Union and about other employees' support for the Union. It is also alleged that on June 19 Moricone interrogated employees about the Union and about other employee support for the Union.

C. Evidence Adduced Regarding Independent 8(A)(1) Violations

With one exception (discussed below), under questioning by counsel for Respondent, both Mehmedovic and Neiditch generally denied having discussions of any sort about Local 32BJ or any other union with employees at any relevant time or threatening them in any fashion for supporting the Union. Thus, Mehmedovic denied having any conversation with Alovic or Alaj in 2009 regarding Local 32BJ. Likewise, she stated that she did not speak with any employees regarding their support for the Union in March 2009, April 2009, or June 2009. Neiditch testified that he did not speak with either Christopher or Alovic about Local 32BJ or unions in 2009. He spoke with no other employees in 2009 regarding Local 32BJ. Respondent further relies upon testimony adduced from employee witnesses Lindsay Perez and Luis Lopez regarding the fact that neither Mehmedovic nor Neiditch ever spoke to them about the Union.

Christopher testified that prior to the commencement of organizing in March 2009 he had two conversations with representatives of building management about Local 32BJ. There was also one conversation which took place after the organizing activity commenced.

Christopher testified that in about January 2009[9] Neiditch told him that he needed his help after work, and the two went to the nearby parking garage where Neiditch kept his car and drove to a downtown location to assist an unnamed individual move a television set. Neiditch told Christopher that he knew that he wanted a union and Christopher said he did. As Christopher testified, Neiditch said it wasn't about him, but that he did not want a union and that Mehmedovic did not want one either.

The next conversation testified to by Christopher also took place prior to the organizing campaign. Christopher was at the front desk and Neiditch came by and commented that he looked sad. Christopher testified that he was in need of a union and Neiditch told him, again, that it wasn't about him and that management did not want a union.

The third conversation occurred after Christopher signed a union card. Neiditch asked Christopher if he wanted a union. Christopher stated that he did because he needed a 401(k) plan and a pension. Neiditch said it was about management, not about him and that Mehmedovic did not want a union. Neiditch additionally stated that management was trying to get employees a salary increase.

Alovic testified to three conversations with building man-

[9] All dates going forward are in 2009 unless otherwise indicated.

agement about the Union. The first took place in March 2009, in the lobby. He was working as both concierge and doorman as the concierge was running late. Neiditch came over and asked Alovic if he had his business cards.[10] Although there were some in the drawer, Neiditch gave Alovic some more.

As Alovic testified on direct examination, Mehmedovic came by shortly thereafter and accused Alovic of trying to bring the union into the building. Neiditch, laughing, said he didn't think so and Alovic said it wasn't him. Mehmedovic then said, "Nic, listen to me, tell me the truth." And Alovic protested that he was. According to Alovic, Mehmedovic then stated, "Nic, if you try to bring the union here, you will be fired." Alovic replied that he did not want to be fired. Mehmedovic then replied, "I'm not saying I'd fire you, but I'm saying if you get fired, don't think the union [will] bring [you] back in the building." Neiditch cautioned Alovic to "be careful." Alovic asked what was wrong with bringing in the Union, as it had already been 2 years. Then Neiditch asked if Christopher was involved like in 32BJ like him and Alovic said he didn't know anything like that. Neiditch said he was just asking.[11]

During his cross-examination, Alovic was shown his pretrial affidavit and then asked whether it was true that Mehmedovic had never told him that he would be fired. Alovic's initial response was as follows:

> She said, if you try to bring the union in the building, don't think the union will bring you back in the building if you get fired. I said, I don't want to get fired. She said, if you get fired. I said I don't want to get fired. She said, don't think the union will bring you back in the building. If you get fired, the union just want to make their money. That's what she said.

Alovic was asked again whether Mehmedovic had, in fact, told him he would be fired, and Alovic replied: "Sabrina said, you're going to get fired, if you try to bring the union here in the building." Then, Alovic's the relevant portion of Alovic's pretrial affidavit was read by Respondent's counsel into the record, as follows:

> In or about March 2009, Dan approached me in the lobby. Dan started to tell me that I should give his business cards to tenants and he left cards at the front desk. Sabrina walked over and told Dan that she thought that it was me who tried to bring in the union. Dan said it wasn't me. Sabrina said that even if we bring in the union, we shouldn't think that the union can bring us back if we get fired. I said that we didn't want to get fired. Sabrina said that she wasn't saying that we are going to get fired, but if we get fired, we shouldn't think that 32BJ will get our jobs back. Sabrina said that Local 32BJ just wants to make money. Dan started to laugh, saying that everything will be fine. Dan also asked me if I was involved in the union. I said that I signed the card because we want to have better benefits and good pay. Dan said that that would cost a lot of money. Dan said that we have to be careful. I said, okay. Dan asked if Sebastain is like me. I said I didn't know about Sebastain. Dan also asked if Sebastain is working with another broker in the building. I said I didn't know. Dan said that if Sebastain or Lou is working for Ben Haroosh (2K) and if they don't help me, they will be out. Sabrina said they will be out.

The second conversation testified to by Alovic took place in late April with Mehmedovic. She again asked Alovic if he had tried to bring the Union into the building. Alovic replied that he did not know anything about it. Mehmedovic then asked who had signed cards for the Union and again Alovic stated that he did not know. Mehmedovic then repeated her questioning. He remained quiet, and eventually Mehmedovic returned to her office.

In June, Alovic was on his post as doorman. Mehmedovic came in and asked him to get her coffee, which was something he typically did several times during the week. Alovic went out and returned with coffee for Mehmedovic. She asked Alovic if he had signed the union petition, and he replied that he had. Mehmedovic then started yelling, demanding to know who had brought it into the facility. Alovic stated that he did not know but he did remember signing it. He claimed to have forgotten who had showed it to him. Mehmedovic replied that she will see who signed it, and we will see what happens.

Lulzim Alaj (Lou Alovic), who is Alovic's brother, is a current employee of the Atelier. He was hired in January 2007 as a concierge. He is a signatory to the union petition. Alaj testified that in about February 2009 he was on duty at the front desk in the building lobby. Neiditch and Mehmedovic questioned him. Neiditch asked Alaj if he wanted the Union in the building and Alaj replied that he did. Neiditch then asked why. Alaj stated that employees wanted better benefits and a pension. Neiditch then asked whether, if the building were to provide those benefits to employees would, they not sign for Local 32BJ. Alaj replied no, that the building employees work as hard as anyone. Mehmedovic replied that the building employees worked harder. Alaj stated that he replied that the employees don't want anything more of less than other Union represented employees had.

Alaj testified to another conversation in early June 2009. He was at his post and received a phone call from Mehmedovic. Mehmedovic stated that she saw that the employees had signed for the Union, and Alaj responded that they had. She asked him who the ringleaders were and he replied he did not know. She asked how had he signed and Alaj stated that the union representative had been outside, asked if he wanted to join and he then signed a card. Mehmedovic said it was weird that Alaj had signed for a stranger, and Alaj replied that he had known him to be a union representative. Mehmedovic then hung up the phone.

Other employees, called by Respondent, testified in this pro-

[10] Neiditch apparently asked employees to distribute his business cards to potential sellers, renters or purchasers. If the distributed cards produced business, he would compensate employees for their efforts.

[11] According to Alovic, Neiditch also asked if employees were working for an owner named Ben Haroosh, with whom Neiditch and the Board were having a dispute over prohibited short-term rentals. Neiditch stated that if employees were working for Haroosh, they would be fired.

ceeding as will be discussed below. Of relevance to this particular issue is that two of these employees, Luis Lopez and Lindsay Perez denied that they were spoken to by Neiditch, Mehmedovic or Moricone about Local 32BJ. Lofti Habib, another employee who testified herein, was not asked whether anyone from building management spoke to him about the Union.

D. The Discharge of Nazmir (Nic) Alovic

1. Alovic's prior discipline and disciplinary notices

As noted above, Alovic was recruited by Moricone to work at the building from its inception. His disciplinary record was apparently unvarnished until January 2009 when Alovic was suspended for 3 days. In that incident, Mehmedovic accused Alovic and the concierge on duty, Laura Qoku, of leaving the lobby unattended.[12] At the time Alovic was suspended, as he admitted, Mehmedovic warned him, "next time, I fire you."

A written warning dated January 28 was introduced into evidence by the General Counsel. Signed by Moricone, it reads:

> Nazmir left his post and went on break without being relieved properly He had left the lobby unattended and put the security of the building at risk. All employees are aware that the lobby cannot be left unattended. Nazmir has been working as a doorman for nearly five years and is aware of the protocol for proper relief and knows that leaving his post is not allowed.

While Alovic acknowledges having been suspended on this occasion, he denies having seen this warning at the time it was purportedly issued to him, and although there is a line for employee signature, it is not signed.[13]

Mehmedovic testified that she initially had terminated Alovic, who then went to Neiditch to complain. After Alovic spoke with Neiditch the discharge was converted to a suspension. Mehmedovic claimed that Alovic stated that "he was going to go there and was going to come back" and was yelling and screaming. She told Neiditch that it was unacceptable, that Alovic had had too many chances and was out of control, but Neiditch said to give him one more chance because he was handicapped.

In April 2009, an incident occurred where a tenant accused Alovic of not properly attending to his duties and, as Alovic testified, used profane language toward him. The tenant received a delivery later that day and when Alovic called upstairs to inform him it had arrived, the tenant again used profane language. Mehmedovic questioned Alovic about it the following day.

On April 6, an employee disciplinary report was prepared by Mehmedovic. It states:

> Nazmir was warned by both Robert Moricone, Resident Manager and myself that if he continued to disrespect and argue with any homeowner/resident guest, vendor etc. he would be terminated immediately.

The report prepared by Mehmedovic also notes the January incident for which Alovic and Qoku were suspended and further outlines that on March 18, Alovic received a verbal warning for unprofessional behavior and cursing in the mail room.

Again, Alovic claims that he never saw this warning notice when he was employed at Atelier. He further testified that Mehmedovic did not warn him that he could be terminated for being disrespectful toward or arguing with home owners or guests of vendors. He denied receiving a verbal warning in March 2009 regarding his behavior in the mail room and also denied cursing in the mailroom during that period of time. The April 6 warning is not signed by Alovic.

Mehmedovic testified only that this document was an employee warning which was maintained in Alovic's file in the office. She offered no substantive testimony regarding any of the additional infractions set forth in the disciplinary notice, namely disrespectful conduct toward a homeowner, guest or vendor or any purported unprofessional behavior or cursing in the mailroom.

2. Alovic's discharge

Approximately 2 weeks after the union petition was sent to the Atelier board of managers, on June 19, Alovic reported to his regular 7 a.m. to 3 p.m. shift. Lindsay Perez was the concierge on duty. They had worked together in the past. As Alovic testified, at noon or shortly thereafter the doorman and concierge would relieve each other for their midday lunchbreaks which usually lasted between 30 and 40 minutes.

On that day, as Alovic testified, at about 12:15 p.m. he told Perez he would be going on his break, went to purchase lunch and proceeded downstairs to the employee cafeteria. At about 12:25 p.m. Moricone entered the cafeteria and asked Alovic what he was doing there. Alovic replied that he was having his lunch. Moricone stated that Perez was repeatedly calling him stating that she did not know where Alovic was. Alovic asked Moricone, do you see me eating or do you see me playing? Moricone acknowledged that Alovic was having lunch but reiterated that the concierge did not know where he was. Moricone then left the cafeteria.

At about 12:40 p.m. Alovic returned from his break and went to the concierge desk to relieve Perez. She returned at about 1:45 p.m. and Alovic returned to his post at the door. At about 2 p.m. Moricone approached Alovic and stated that he had worked a very long time for him, that he had seen some cards in the cafeteria and asked Alovic if he had been the one trying to bring in the Union. Alovic responded that he did not know anything about it. Moricone persisted and asked Alovic if he had signed the card. Alovic responded that he had. Moricone then went from the front entrance to Mehmedovic's office.

Some time thereafter, Moricone returned and informed Alovic that he was discharged. As Alovic testified, Moricone

[12] Alovic denies leaving the lobby unattended on that occasion.

[13] A similar warning notice was prepared for Qoku, who was also suspended for 3 days. This notice was not signed by her. She subsequently received warning notices on March 11 and 14 for, among other things, leaving her post unattended without proper relief, and not clocking in and out of work. Qoku was discharged on May 13 and her termination letter references these warnings in addition to other instances of misconduct occurring on April 26, May 2, 8, 9, and 13, which will be discussed in further detail below.

again asked him if he was the one who tried to bring in the Union, and asked Alovic to confirm that that he had signed cards. Alovic acknowledged that he had. Moricone then told Alovic that he was sorry, that he worked with him for a long time, but he should go home now—that he was fired.

On cross-examination Alovic first stated that the distribution and collection of union cards began and ended in May, but then stated that on June 18 he had left some cards on the table in the employee cafeteria for employees to sign and return to him on the following day. He could not recall whether the cards were still there when he had lunch on the following day.

Respondent called two current employee witnesses, Lofti Habib and Lindsay Perez, to testify as to the events leading to Alovic's discharge on June 19. According to Habib, he saw Alovic in the cafeteria at approximately 1:45 to 2 p.m. during the time he usually takes his coffeebreak. The two men did not speak. That was initially all that Habib recounted about this event. On cross-examination, Habib admitted he would not be able to specifically identify other employees he might have seen in the breakroom on any other particular day. Then, on redirect examination, Respondent showed Habib a document which, as the transcript states, was General Counsel's Exhibit 5. The witness was asked whether he had seen this document before and his answer was in the form of a question: "Have I seen this before?" On that rather confusing note, Respondent's counsel directed the witness' attention to June 19 and asked whether anything unusual happened at the Atelier on that day. Habib then stated that while he was having his coffee, Alovic came in with a pizza box. Moricone came in and asked Alovic what the f—k was he doing there right now. Then, Moricone and Alovic got into a verbal dispute culminating in Moricone ordering Alovic to report upstairs right away, to which Alovic responded by throwing the pizza box and cursing at Moricone.[14]

Perez testified that at about 12 p.m., Alovic disappeared from his post, and she assumed that he was using the restroom. Shortly afterward, she noticed that Alovic's car, which was parked out front, was gone. About 15 to 20 minutes later Moricone came by and asked where Alovic was, and Perez replied she thought he was in the restroom. She did not mention that Alovic's car was missing. It does not appear from the record that Moricone made an attempt to contact Alovic at this time. Perez then called Alovic herself, but he did not answer and she did not leave a message. About 20 minutes later, an assistant manager referred to in the record only as Ozey,[15] came by the front desk and asked for Alovic. Perez he was not there, and then called Alovic again. Perez asked Ozey if Alovic was in the breakroom and Ozey replied that he was not and then tried to call Alovic himself.

After Alovic was missing for about 2 hours, Perez called Neiditch and Mehmedovic. As Perez testified, Neiditch came down to the front desk to wait for him. Then, at about 2 p.m., Alovic showed up at his post arriving via the back staircase which led to the basement and the employee cafeteria. Alovic appeared to be angry, and was slamming the desk. Neiditch came back to the front desk and told Alovic to report to Mehmedovic's office. About 10 minutes later, Perez was called to the office as well, and Alaj, who was cleaning the lobby at the time, covered for her at the concierge desk.

Perez reported what had occurred with Alovic, returned to her post and started to complete an incident report. Alovic came out of Mehmedovic's office and was angry. He told Perez to mind her "f—king business." Perez told him to calm down, as three clients of Neiditch's were at the front door. Alovic returned to his post, but he walked back and forth between the concierge desk and the door. At this point, Perez called Mehmedovic and Moricone and said someone had to control Alovic. After a while, Moricone arrived and took Alovic to the backroom. Perez then completed her incident report, which outlines the behavior described above. Perez testified that incident reports are completed when something happens in the building that is out of the ordinary.

On cross-examination, Perez noted that the Atelier also maintains a log book, which is a contemporaneous record of what happens during a concierge's shift. If an out of the ordinary incident occurs it would be noted, and this is the case for those circumstances where an incident report is warranted as well. However, Perez was equivocal about whether she had made any entries in the log book relating to the sequence of events relating to Alovic's alleged misconduct. Perez further testified that she remained at her post for her entire 8-hour shift without taking a break for a meal and that the incident report was completed while she remained on continuous duty at the concierge desk.[16]

Mehmedovic testified that she called Perez to her office with Moricone and Ozey present, asked her what happened and Perez explained that Alovic was verbally abusing her and screaming in the lobby in front of guests. Later, Mehmedovic had a meeting with Moricone, Ozey, and Alovic. Moricone was very angry with Alovic for leaving without notifying anyone and for cursing and screaming in the lobby. According to Mehmedovic this had not been the first time he had behaved in such a fashion. Alovic had a card in his hand and said that he was entitled to take a lunchbreak and that the union would bring him back to work. Mehmedovic testified that she told Alovic that he had had too many chances, it was over and that no union would bring him back to work. Mehmedovic further

[14] There is ambiguity in the record as to what Habib was shown which prompted him to tell this account of events. The exhibit in the record which is marked as GC Exh. 5 is a subpoena duces tecum addressed to the custodian of the records of Atelier and CSR. I doubt whether that document was the one shown to Habib. In any event, I am unable to discern from the record what document he was shown which prompted his recollection of events not reported during his direct examination.

[15] Although Ozey is referred to as "assistant manager," he is not alleged as a supervisor or agent of Respondent and no evidence of his status as such was adduced or otherwise litigated at the hearing. He did not testify herein.

[16] The concierge may not eat while on duty at the front desk.

testified that Alovic was cursing and screaming during the meeting and Ozey had to take him downstairs to settle down. Mehmedovic testified that did not see Alovic further that day.

Mehmedovic testified that she spoke with Neiditch and told him that she could not believe that Alovic was acting up again, that Moricone was furious and was going to terminate him. Neiditch said that they had to do what was best for the building.

Mehmedovic also recounted that after the incident in January, she wanted to terminate Alovic. She was disappointed in him and told him that all he had to do was his work as a doorman. According to Mehmedovic, Alovic went to Neiditch, crying, and the termination was turned into a suspension.

Mehmedovic did not offer testimony to specifically rebut Alovic's contention that he was not shown either of the prior written warnings which, as Mehmedovic testified, had been maintained in his personnel file.

When asked about the events leading to Alovic's discharge, Neiditch testified that he received a telephone call from Mehmedovic in which he learned that Perez had accused Alovic of disappearing from his post for a certain amount of time and that Alovic returned and cursed her out. During this telephone call, Mehmedovic told him that Alovic was to be fired. According to Neiditch, he asked Mehmedovic to give Alovic another chance. Neiditch offered no testimony regarding being called to the front desk by Perez and waiting for Alovic to return, or directing him back to see Mehmedovic. Although Neiditch testified that he met clients in the building on that day, he did not testify that they told him of any unusual occurrence in the lobby or that they were alarmed by the conduct of a building service employee while they waited for him.

Neiditch offered no testimony about any of Alovic's prior discipline and, in fact, testified that prior to his discharge had had no involvement with Alovic's conduct or performance in the building.

Mehmedovic testified that Moricone sent her the following email. Dated June 26, it outlines the circumstances of Alovic's discharge as follows:

> On Friday, June 19th 2009, just before 12:00 pm Nazmir had left his post without informing (Lindsey Perez) the concierge on duty. I had asked Lindsey if she knew where Nick was and she was not sure as she was retrieving keys from the key closet when Nazmir had left his post. Lindsey had thought that he may have went to use the lavatory but was not sure. Nazmir was not present at his post for more than one hour.
>
> I found Nazmir in the staff cafeteria speaking with other employees and not completely dressed in his uniform. Sabrina the onsite property manager and I both had a discussion with both employees to hear their interpretation of what occurred. We also reinforced the importance of communication.
>
> After our short meeting Lindsey called the management office and had explained that Nazmir was slamming the doors at the concierge desk and had told her why don't you keep your FN mouth. I went to the lobby and witnessed his terrible behavior. Lindsey was nervous and the 3 people sitting in the lobby confirmed that he was acting worse before I arrived.
>
> Nazmir continued to act out of line and continued to carry on with hostility. I then asked him to get his belongings and leave the building as he was terminated.

E. The Discharge of Sebastain Christopher

1. Christopher's suspension

On the morning of June 22, a resident named Michael Buckley approached Christopher, who was working at his post as doorman at the time, and asked to be allowed access to the basement. Christopher called Moricone, who was not present at the facility. As Christopher testified, Moricone stated only that Buckley had emailed him some 15 minutes prior and then hung up the phone. Christopher told Buckley that neither Moricone nor Mehmedovic were present at the time. Buckley then asked Christopher to call handyman Habib and ask him to meet Buckley in the basement. Habib stated that he was busy. After about 15 minutes, Buckley returned and said there was a leak in the basement, so Christopher called Habib and asked him to meet Buckley in the basement. Habib stated he would do so in a few minutes, which he did. When Habib went to the basement, Buckley, who was accompanied by others, [17] asked him to open the so-called "pit." As Habib testified, this is a room which is not supposed to be open to outside contractors unless one receives permission from management, in particular from Mehmedovic or Neiditch. Habib testified that when Christopher called him, he was under the impression that Christopher had obtained permission to open the pit for Buckley.

Subsequently, Mehmedovic arrived at the facility and called Christopher into her office. Moricone participated via speaker phone. Moricone essentially asked Christopher to confirm that he had instructed him to call Mehmedovic, and Christopher replied that the only thing Moricone had said on the phone was that he had received an email from Buckley some 15 minutes earlier. Mehmedovic stated that she was going to discharge Christopher and that he should go home. Christopher protested, stating that the only thing he had done wrong was to call Habib. Mehmedovic insisted that Christopher leave the building.

On his way out of the building, Christopher saw a tenant and explained his situation and the tenant advised him to bring the issue to the attention of CSR. So he went to their office and spoke with Ben Kirschenbaum (Mr. Ben). Kirschenbaum advised Christopher to give Mehmedovic some time and then discuss the incident with her. Christopher then returned to the Atelier and Mehmedovic instructed him to return to work the following day at which time they would discuss the matter with Moricone.

The following day, June 23, Christopher returned to work and was at his post when Moricone summoned him to Mehmedovic's office. Habib was there as well. Moricone again insisted that he had instructed Christopher to call Mehmedovic

[17] The record fails to establish who was accompanying Buckley on this occasion.

and Christopher denied that, stating that the only thing Moricone had said was that Buckley had emailed him earlier in the morning. Habib protested that he was being blamed for anything; and said that he had opened the pit but no work was being done. Christopher stated that he did not tell Habib to open the pit, but only to meet Buckley in the basement.[18]

After this discussion concluded, Mehmedovic suspended both employees for 2 days. She told Christopher that he had not listened when Moricone had instructed him to call her. She told Christopher to return to the office to sign a suspension form.

Christopher initially resisted signing the form, and requested that he receive a warning instead, as this was his first offense in over 5 years of employment at the Atelier. As Christopher recounts it, Mehmedovic minimized the importance of the suspension notice and based on that, he reluctantly signed the form later that afternoon. After he signed the suspension notice, Christopher told Habib that he was going to the Union to complain, but Habib declined to go. On June 24, Christopher went to the Union to complain about his suspension.

The suspension notice given to Christopher and signed by both Christopher and Mehmedovic is as follows:

> Failure to follow instructions on June 22, 2009 at 9:20 AM
>
> Instructed Lofti Habib (handyman) to escort and provide access to buildings [sic] ejector pit mechanical room for the sponsors [sic] representative Michael Buckley who was with outside contractor Corecoc, specifically after Sebastain was notified by the Resident Manager, Robert Moricone via telephone that he is not to provided [sic] access.
>
> Sebastain was reminded that he is never to misdirect his coworkers to doing something that was clearly against what the Resident Manager instructed him to do in the first place. Sebastain was informed that he is only to take direction from Robert or myself not the sponsor's representatives and outside vendors regarding building matters.
>
> Sebastain knows exactly what the buildings [sic] guidelines and procedures are pertaining to outside vendors accessing the building's mechanical rooms other than building staff. In addition the contractor was not signed into the daily logbook yet they were given access into the building without any information documented.
>
> Sebastain expressed his thoughts that in his opinion he should not be held accountable and tried to blame Lofti Habib for not confirming with Robert before providing access. Robert has stated that Sebastain was clearly given appropriate direction from him during their telephone conversation.
>
> I can confirm that no work was scheduled and no contractor is allowed in the building unless it is scheduled accordingly and proper liability insurance is given to management before work can take place.
>
> As per our meeting today June 23, 2009 at 4pm regarding the above incident with Moricone, Lofti Habib and myself Sebastain was informed that he is not to disobey his superiors again and if he would fail to follow instructions again that he would be suspended without pay and could lead to terminating his employment at Atelier.
>
> Actions Taken: I support Robert Moricone's decision and agree that Sebastain be suspended without pay starting Wednesday, June 24 2009 for 2 days and shall return to duty on Sunday June 28th 2009.

As Christopher explained, without rebuttal, Wednesday and Thursday were regular workdays for him and Friday and Saturday were typically his days off. That is why the memorandum references his return to work on Sunday, as that would have been the first day he was scheduled to work after the suspension.

2. Christopher's discharge

On Saturday, June 27, Christopher returned to the building to perform a scheduled side job for a resident named Lisandro.[19] Christopher had worked a number of such side jobs previously, although it appears from his testimony that all other side work he had done in the building had been performed at the behest of Neiditch. On this occasion, Neiditch had recommended Christopher to the resident with the caveat that the work be performed on Christopher's time off.[20] According to Christopher, the other building service employee recommended by Neiditch was unavailable, so he enlisted the assistance of a friend to help him with the move. When he arrived at the building, he stopped by the front desk where Perez was the concierge on duty. He told her that he was going to apartment 12G to do some moving. Perez called the tenant who authorized her to send the men up. The tenant called for the service elevator and when it failed to arrive after about 20 minutes, the tenant called down to the front desk again. As Christopher testified, use of the service elevator must be scheduled and approved by building management.

As porter Luis Lopez, called to testify by Respondent, recounted, he was working the freight elevator that day and the front desk informed him that a tenant had a pickup on the 12th floor. Christopher was assisting that tenant move from the 12th to the 11th floor. On the following day, Lopez was called into a meeting with Moricone and asked whether he knew that Christopher had been suspended and not allowed in the building.

[18] Christopher testified, without contradiction, that the basement contains a number of facilities for the use of the building's residents and that a request to meet a tenant in the basement was not an unusual occurrence.

[19] This individual is also referred to by other names such as "Locardo," "Ricardo" and "Cassandra." It is clear from the record that these references are to the same tenant for whom Christopher performed work.

[20] Christopher produced an email addressed to the resident (Lisandro) which had been sent by Neiditch, recommending him for the job. Respondent argues that I cannot properly rely upon this evidence, but I note that Neiditch admitted the substance of the email. In particular, Neiditch testified that Lisandro was an owner who had become a renter and that Neiditch had recommended that Christopher and another building service employee help him with moving from one apartment to another on their off hours.

Lopez stated that he did not know. At Moricone's direction, Lopez prepared the following incident report:

> I was running the elevator and I was called to pick up on the 12 Floor for 12G when I got there Sebastain was waiting there with a sofa. He told me to take him to 11E. I asked the front desk if it was OK to move 12G to 11E.

Respondent maintains that, in addition to the fact that Christopher had been on suspension and not authorized to be in the building, he used the freight elevator without securing the permission of building management. Christopher maintains that the tenant was responsible for obtaining such permission and had assured him that he would do so. I further note that although Perez testified, herein, she offered no testimony about what occurred on this occasion.

On June 28, Christopher was at his post when Moricone approached him and instructed him to go home; that the building did not need him anymore. Christopher testified that as he was downstairs changing, Moricone came downstairs and told him that although Habib had been suspended as well, he had not gone to CSR or the Union.

Respondent introduced into evidence a letter documenting Christopher's termination. Dated June 29 and signed by Mehmedovic, it reads in relevant part:

> On June 24, 2009 you were suspended, without pay, for two days for the incident that occurred on June 22, 2009. At that time, you were informed that your insubordination will no longer be tolerated. As I clearly stated when we spoke on June 22, 209, you were required to report to myself in Robert's absence personally regarding building business.
>
> On June 27, 2009 you had the audacity during suspension to come to the building on a non work related day without informing nor receiving approval from the Resident Manager or myself to take part in an in house transfer from unit 12G to 11E. Clearly knowing that employees are not permitted to perform additional work other than assigned duties even during their days off. All employees have been informed that they are not to access the building to report to work for their assigned duties. In addition all employees were reminded of this policy during our last staff meeting that was held on June 2, 2009.
>
> On June 28, 2009 Robert Moricone informed me that when he questioned you as to why you blatantly went against buildings [sic] policy by coming to the building on Saturday June 27, 2009 to assist a homeowner with an unscheduled in house move. According to Robert you did not produce a legitimate explanation and showed no remorse regarding this matter.
>
> On April 29, 2009 you did not attend a mandatory refresher course held in cooper squares [sic] learning center. At no time did you contact Robert Moricone, the Resident Manager, or myself with an explanation as to why you were not able to attend. Additionally, on April 29, 2009 you left your post to go to a homeowners [sic] unit without approval and [were] seen wandering the building on several different occasions. I personally spoke to you and reminded you that you are not to go upstairs in the elevator and leave your post. In the event an elderly or handicap[ped] person needed assistance you or the Concierge on duty were informed to radio a porter for assistance.
>
> Both the Resident Manager and I have sat down and talked to you on several occasions. We have explained what was expected of you. Your actions have clearly indicated that you have no interested in retaining employment here at Atelier.
>
> Your repeated insubordination and lack of dishonesty [sic] has confirmed that you cannot be trusted as you are fully aware that your duty is to entrust the safety of Atelier and its homeowners. Your actions will no longer be tolerated and therefore you are terminated effective immediately.

Christopher denied receiving this letter. With regard to the additional two incidents referred to in the termination letter, Christopher denied leaving his post unattended or receiving discipline about it. With regard to the alleged failure to report for training, Christopher stated that he had received permission from Moricone and Mehmedovic to miss the training because he had to attend a doctor's appointment for his son. Mehmedovic did not testify either of these alleged incidents on April 29 or about her verbal warning to Christopher. She also failed to offer testimony regarding any other verbal counseling she may have issued to him on any other occasion, either by herself or together with Moricone. Neiditch testified that Christopher was discharged because he was suspended and returned to the building while on suspension to do work. Neiditch maintained he had no involvement in the issue. He did not offer testimony as to the other incidents referred to in Christopher's letter of termination.

F. The Allegedly Unlawful Lawsuit

1. Background

In early July 2009, a group of Atelier owners filed a lawsuit against Neiditch, Mehmedovic, and other members of the Atelier board of managers, CSR, and Neiditch's real estate company seeking to set aside, allegedly as ultra vires and product of collusion and bad faith, the control and purported manipulation of sales and leasing of the Atelier units. The complaint alleged corruption, bribery, extortion and payoffs as part of the scheme and demanded that the conduct be enjoined.

The same day the lawsuit was filed, Moricone committed suicide by a self-inflicted gunshot wound. Shortly thereafter, postings regarding the alleged brokerage scheme and Moricone's suicide appeared on a website called "Atelierowners.wordpress.com." which claimed to be a "new networking site created to help Atelier residents counter corruption." Another post on the site was entitled "Atelier Building . . . site of Corruption Mess and One Man Dead So Far." These posts (which are set forth in further detail below) discussed Moricone's suicide and the alleged corruption and other misdeeds engaged in by Neiditch and Mehmedovic. On July 6–7, several other anonymous posts were made on a website maintained by Ning.Com which once again discussed the death

of Moricone and the subjects of the lawsuit filed on July 1.

On July 4, a series of emails including quotes from and links to the websites were exchanged between Mehmedovic and other CSR representatives. In one message, Mehmedovic identifies the "sick people" responsible for the postings: "I think its [sic] nick and ali jafari." The email string ends with Mehmedovic writing: "We need to act on this immediately!"

On July 8, Neiditch, using his River to River email address, distributed this memorandum to the building residents:

> Subject: FW: Important Message From Atelier Board
> My fellow home owners,
>
> It is very sad that I am writing in regard to a disturbing website and emails that have been going around the building. What is being written is libelous at best and is damaging to the building's name because the home page is public. The lies/slander written hurt the reputation of the building, property values, its workers and our residents with their despicable actions. Nothing written has made any sense or has any truth and I'm truly sorry it is out there and that it is hurting so many people especially Robert's family.
>
> I know that this has been a horrible time for everyone in the Atelier and the demeaning website—a couple owners created along with former employees have led to more damage—making an already sad time even harder. This despicable website has come in a time of my friend/our beloved Robert's passing (coming out on the day of his death) in order to stir propaganda to discredit Sabrina, Cooper Square, the board and myself in order for those responsible to gain passage for illegal business in our home. The people involved in creating this site have been acting in illegal activities in the building such as weekly/daily rentals, using private building information (such as the emails people have received) and allowing dangerous criminals to rent apartments in the building without board approval. This has all been done with their intentions for personal financial gain and the utter disregard for the safety on us all. They will stop at nothing to turn the building into a short term hotel.
>
> As the board and management, we have a zero tolerance policy towards hotel-style rentals. We have been committed to stopping these individuals and keeping our building safe and free from danger. We have continuously caught these individuals and continually fine them. These owners and former employees have most recently let a FBI wanted criminal in the building, we are aware of the situation and working with the FBI and local NYPD authorities to stop these individuals from committing any further fraud or defamation within the Atelier. One of the people involved Charlar Acar was arrested today. Other arrests will follow in this ongoing investigation. They have a frivolous lawsuit against the building to allow hotel rentals in Atelier. They have used the private building information they acquired to try and use the death of Robert to discredit Sabrina, the board and myself with false horrendous accusations. The home owners involved Adrian Zaini (owner 4L) who is disgruntled about not being elected to a position on the board, Chrysanthe Nelson and Michael Denktsis (owners of six units), Carl (former board member) and Orly Ellner (owners of six units) (also have housed Charlar Acar and Ben Harush for the last 2 years and allowed them to commit the illegal rental in the building). These owners currently have $10,000.00 in illegal subletting fines between them plus $30,000+ in fines pending. They are the primary culprits of the hotel rentals we have faced since the buildings inception. The brokers Charlar Acar's (arrested today) and Ben Harush's company is responsible for over 10 fines to owners for improper management. Former disgruntled employees fired for helping this illegal scam operations, are also involved and had been taking bribes to help facilitate illegal rentals to take place for these home owners/brokers to commit fraud and hotel stays. They did not consider the harmful or damaging repercussions of their actions, which caused criminals to be put in our homes and upon being caught were terminated immediately.
>
> We must be strong and move forward from this tragedy and disturbing behavior as we are a family here at the Atelier. The board, Sabrina, and the management team will continue working hard to make sure that the Atelier continues to be a wonderful home for all of our residents. We have lowered rental application fees for all owners to make it easier to go through the proper channels to make sure our building is safe. All applications are approved with safety in mind and all applications are approved and evaluated equally. I have worked hard for the position of the Atelier board president for two consecutive years and the building has been extremely financially successful during my tenure. My years of property management and brokerage experience have been a tremendous benefit to our home's values staying high and could have easily have been another 10–15 percent lower from where they currently are without a real estate professional knowledge. The board and I have kept our building one step ahead of the rental and sales competition and understand the importance of amenities & activities which allow the building to stay occupied. We also continually brand our building's name and image to preserve the stature and property integrity. My being a real estate professional has also given me the ability to spot real estate fraud and other illegal broker activities. We have caught numerous apartments doing illegal activities with their units. The board, staff, Sabrina and I have personally caught them on our own personal free time to ensure all our safety. This is what has been the cause of all these false rumors and allegations: so the real fraudulent people can continue to do whatever they like to without any regard for anyone else. I have a vested interest to all home owners to keep prices high and common charges low. We are one of the only buildings to ever reduce common charges in a NYC condo. This rare occurrence has happened by the board's countless hours of hard work and continued efforts to cut costs, while seeking out new and creative ways to save money. From our energy initiatives, in-house training of staff to cut outside vendor costs, and overall budget cuts we have managed to keep what is important to the owners. At the same time we

have achieved the ability to add countless new creative amenities and features to the building. Some great features have been the BBQ, tennis court, bike room, and storage spaces to name only a few. We have a very financially strong and solid building and the financials are available for all home owners to see and appreciate the work we have accomplished in a short amount of time. We have also made it a mission to have many wonderful events and activities for home owners to enjoy and create a family-friendly environment. We will continue to have art events, BBQ's, holiday parties, children's movie nights, bowling nights, and more. This is our home and we cannot let a few horrendous people/owners ruin it for the rest of us.

Moving forward in the future, the Board, Sabrina, and I will continue to work hard. We will lower building costs, common charges, and keep property values steady through this tough economy. Security is our number one issue and will continue to fight these owners/brokers who want hotel rentals at all costs for our safety. We appreciate all the support of the hundreds of owners who have emailed the board and me and we will continue to make you proud of the hard work we put in. We cannot control people making up lies and these false allegations will be in the hand of the law.

The board, Sabrina and I are always available at anytime to speak on matters and issues that arise. To contact the board please email us at Atelierboard@gmail.com Or contact Sabrina at Sabrina.Mehmedovic@coopersquare.com. My heart goes out to Robert's family and our dear friend will always be missed.

Regards,
Dan Neiditch

President
Atelier Condos

Thereafter, on July 29, an unverified complaint (index number 110783/2009) was filed against two residents of the Atelier (one owner and one renter) and several internet service providers (Twitter, Wordpress.com, Ning.com, and Go Daddy.com) for hosting the allegedly defamatory content. Also named as defendants in the lawsuit were three former employees: Laura Qoku, Blerta Behluli, and Christopher, as well as anonymous defendants John Does 1 through 10 and Jane Does 1 through 10. The lawsuit alleged 15 counts of libel per se and 1 count of tortuous interference with business relations. The complaint states that it is an action alleging libel per se brought to redress serious injury to the reputations of "Plaintiff Daniel Neiditch (a condo building president), Sabrina Mehmedovic (the condo building's property manager) and the Estate of Robert E. Moricone (the estate of the former condo Resident Manager). From a campaign of false and defamatory statements . . . accusations of the serious crimes of murder, bribery, extortion, illicit payoffs and corruption."

Under the following section identifying "The Parties" to the lawsuit, the plaintiffs were identified as follows:

Plaintiff Daniel Neiditch is an individual who is the President of River 2 River Realty Inc. and the President of the Board for the Atelier Condos Building and who maintains an office at the Atelier Condos Building located at 635 West 42nd Street, New York, New York 10036.

Plaintiff Sabrina Mehmedovic is an individual who is the Property Manager at the Atelier Condos Building at located at 635 West 42nd Street, New York, New York 10036.

Plaintiff Estate of Robert E. Moricone Jr. is being administered by his mother, Catherine Saliani, who resides on Long Island, New York.

At this time, the attorneys of record were Nesenoff & Miltenberg, LLP. Shortly after the lawsuit was filed, the alleged defamatory statements were removed from the various websites.

Atelier's general counsel, Jeffrey Dweck, took over the prosecution of the lawsuit in September 2009. Dweck is a general business practitioner who practices property law and commercial litigation. Dweck testified that he withdrew the complaint against the various internet companies because they had pointed the plaintiffs' attention to a statute which protects internet service providers from such lawsuits. Dweck further withdrew the claim against an individual defendant, Adrian Zaini. In his testimony at trial, Dweck maintained that this was because Zaini had filed a sworn statement claiming that he did not have computer access, did not know how to use the internet, and had not posted defamatory material on the internet. In fact, through his attorneys, Zaini had filed a 29-page notice of motion to dismiss the matter as to him, which highlights purported legal errors and insufficiency of the pleadings in the lawsuit and requests summary judgment in his favor. Zainy's affidavit, submitted in connection with these pleadings asserts that: he is not the author of any of the statements; he has never posted anything on any of the websites named in the complaint or any other website or blog naming Neiditch, Mehmedovic, or Moricone; that he has not ever had user accounts for the named websites and he is not the administrator, nor does he edit or control the content of the named websites. Dweck admitted that he did not want to spend time and money responding to Zainy's motion.

On February 26, 2010, the Acting General Counsel of the NLRB issued a complaint against Respondent alleging that the discharges of Christopher, Qoku, and Behluli were unlawful.[21]

Dweck testified that he attended two court conferences in early 2010. In February, there were no appearances for any of the defendants, and the court put the conference over until March. In that subsequent conference with the judge assigned to the matter, Dweck stated that he did not know if the individual defendants had filed appearances. The matter was then put over until June 2010. One day prior to this scheduled conference, Dweck received a telephone call from an attorney purporting to represent some of the defendants. The attorney re-

[21] Qoku and Behluli were subsequently severed from this matter. The complaint allegations were dismissed insofar as they pertained to these individuals on September 3, 2010.

quested that Dweck allow him time to file an answer to the complaint, and Dweck agreed to do so. The attorney, whose name Dweck could not provide, represented that he would attend the conference scheduled for the following day and obtain an adjournment of the matter. It appears that this attorney failed to keep his word and when Dweck called the court to obtain the adjourned date, he was told that the lawsuit had been taken off the calendar because no party had attended the conference. Christopher, however, testified that he obtained notice of the conference and went to court. When the plaintiff failed to appear the judge took the case off the calendar.

Corroborating Christopher's account of events is an order signed by Judge Debra James for case index number 110783/2009 dated June 3, 2010, which states the following: "ORDERED that this action is DISMISSED pursuant to Rule 202.27 and plaintiffs' attorney has not appeared and defendants pro se SEBASTAIN CHRISTOPHER and LAURA QOKU have appeared. It is the order of the court." The order is signed by both Christopher and Qoku.

As Dweck testified, he considered whether to attempt to reinstate the original lawsuit, but decided that simply filing another lawsuit would be less cumbersome, time-consuming and costly. He was also running up against the expiration of the statute of limitations for defamation, and the filing of the new complaint would allow him to clean up the pleadings to remove references to prior defendants who he no longer intended to include in the cause of action. Thus, on June 8, Dweck filed a new lawsuit (index number 150122/2010) with Neiditch and Mehmedovic as plaintiffs naming Christopher, Qoku, Behluli, and 10 John Does as defendants. Neiditch and Mehmedovic are identified in the same fashion as in the original lawsuit, as set forth above.[22]

The lawsuit, which seeks damages in the amount of $190 million ($12 million for each of the first 15 causes of action and $10 million for the 16th, is predicated upon the following allegations:

> ALLEGATIONS COMMON TO ALL CAUSES OF ACTION
>
> 9. The Atelier Condos Building at 635 West 42nd Street in New York City has been a desirable residence in Manhattan. The policy of the owners and management of the Building, reflected in the building rules, has been to be opposed to stays under 90 days, which still has been and is relatively lenient because in many buildings in Manhattan, the minimum lease term is for one year. In November 2008, it was decided by the Condo Board that no rental would be allowed under 90 days in order to safeguard the building's reputation and maintain standards in the building.
>
> 10. Plaintiff Daniel Neiditch, as the President of the Atelier Condos Building at 635 West 42nd Street in New York City, and Plaintiff Sabrina Mehmedovic, as Property Manager of the Atelier Condos Building, have diligently exercised their respective responsibilities in the operations of the 635 West 42nd Street building; and, in the course of doing so, they have cracked down and enforced the Condo Board's decision not to allow renters for less than 90 days in accordance with building rules. Plaintiff Daniel Neiditch and Plaintiff Sabrina Mehmedovic also have cracked down and enforced the building rules against occupants engaging in business activities in the building. In these efforts, Plaintiff Daniel Neiditch and Plaintiff Sabrina Mehmedovic had the full working cooperation of Robert E. Moricone, Jr., the Resident Manager of the Atelier Condos Building who had held that position many years. These efforts, however, made unhappy certain owners, who were desirous of renting their condo apartments for less than 90 days and running businesses in the building. These efforts also made unhappy certain now former employees, such as Defendants Laura Qoku and Blerta Behluli, who were fired for neglecting their job duties.
>
> 11. In response to the salutary efforts of Plaintiff Daniel Neiditch and Plaintiff Sabrina Mehmedovic to enforce building rules, a number of web sites popped up that carried posts and comments by Defendants Laura Qoku, Blerta Behluli, Sebastain Christopher and John Does 1 through 10 who falsely, and without basis, accused Plaintiff Daniel Neiditch and Plaintiff Sabrina Mehmedovic of criminal activity, including murder, bribery, corruption and extortion. Such accusations constitute aggravated harassment in the second degree in violation of New York Penal Law § 240.30. The websites were created through Ning.com and Wordpress.com; and "urIs" operating as masking sites maintained by GoDaddy.com forwarded computer users to the aforesaid websites through Ning.com and Wordpress.com. In addition, the same comments were "twittered" via the service provided by Twitter, Inc. and further forwarded by email to Atelier Condos Building residents.
>
> 12. As stated above, the Resident Manager of the Atelier Building at 635 West 42nd Street for many years was one Robert E. Moricone, Jr. On July 1, 2009, Robert E. Moricone,
>
> Jr. tragically committed suicide by self inflicted gunshot wound. Plaintiff Daniel Neiditch, as the Condo Board President, issued an announcement with "deepest regret" to Atelier Condos Building residents that Robert E. Moricone, Jr. had passed away at age 32, that our "heart and prayers go out to his family" and that he "will be truly missed always."
>
> 13. The response to this appropriate announcement included a post made, on information and belief, by Defendants Laura Qoku, Blerta Behluli, Sebastain Christopher and John Does 1 through 10 at atelierowners. wordpress.com by Defendant Wordpress.com under the headline" Atelier Building, . . ., site of Corruption Mess and One Man Dead So Far" that accused Plaintiff Daniel Neiditch and Plaintiff Sabrina Mehmedovic of "corrup-

[22] The other building resident was also dropped as a defendant, but the record does not establish why.

tion, bribery, extortion, payoffs, etc." The post went on to state:

"Involved, said to include: Atelier Board President, Daniel Neiditch, down to Super, Robt. & mangr, Sabrina Mehmedovic. Leads to ONE DEAD!!!

"All the best & nicest Atelier Bldg employees are routinely instantly fIred, only the worst and most complicit employees are retained."

Atelier Board Pres. Daniel Neiditch runs a corrupt operation."

The post falsely continued:

"Wow! This just in: There was a heated closed-door meeting between Sabrina, Dan & Robert.

"When they all came out, Robert looked so terribly upset, no one had ever seen him that upset before.

"Robert kept mumbling, I can't take this any more . . . Many assume Robert was asked to do more corrupt cover-up type things, lies, etc.

. . . .

"But, many say, these sort of lies, cover-ups, scams, tyranny are all the norm for the corruption with Atelier board pres. Daniel Neiditch."

After quoting Plaintiff Daniel Neiditch's announcement of Robert Moricone's death, the post stated:

"Is it laughable . . .? Or cryable? Many Atelier residents are asking themselves.

. . . .

"The two faced lies from Daniel Neiditch (Pres., Atelier Condos) and his Nazi-like paid staff like Sabrina Mehmedovic, are just sickening.

"Many Atelier residents know what's been going on for some time & are demanding Criminal Charges be levied against Daniel Neiditch, . . . Sabrina Mehmedovic, and a few other conspirators.

"For the latest breaking news updates, follow us on Twitter at http://twitter com/atelier corrupt."

On information and belief, what was "twittered" were the same false, defamatory statements; and masking sites maintained by GoDaddy.com identified above sent computer users to the post described in this paragraph.

14. That same day, July 1, 2009, another post was made, on information and belief, by Defendants Laura Qoku, Blerta Behluli, Sebastain Christopher and John Does 1 through 10 at atelierowners.wordpress.com by Defendant Wordpress.com under the headline "New Networking Web Site Created to Help Atelier Residents Counter Corruption," stating, among other things, that:

"It is still unclear at this point whether the death of the building's Resident Manager, Robert Moricone, today was a murder, a suicide, or something else altogether. However, rumors are flying that Mr. Moricone's death happened immediately after a meeting with the building's Board President, Daniel Neiditch, and his "right-hand-man", Sabrina Mehmedovic."

"For the latest breaking news updates, follow us on Twitter at http://twitter.comlatelier_corrupt."

This statement was false. There was no lack of clarity to the circumstances of Robert E. Moricone, Jr.'s suicide death; the statement about lack of clarity and possible murder was made to insinuate, falsely, that Plaintiffs Daniel Neiditch and Sabrina Mehmedovic were responsible for the death of Robert E. Moricone, Jr. On information and belief, what was "twittered" were the same false, defamatory statements; and masking sites maintained by GoDaddy.com identified above sent computer users to the post described in this paragraph.

15. Meanwhile, in the days that followed on July 6-7, 2009, at a site maintained by Ning.com, and further transmitted by Twitter, Inc. and GoDaddy.com, the following false statements were made, on information and belief, by Defendants Laura Qoku, Blerta Behluli, Sebastain Christopher and John Does 1 through 10:

"[Q]uestions are being raised and rumors are flying that Neiditch and Sabrina Mehmedovic's scandalous corruption has finally led to it's [sic] first real death."

"It is so sad that people like Sabrina and Daniel think they can play with people life's Poor Robert had to deal with them and look what happened to him. Don't you people wonder why he wanted [S]abrina in his apartment she was causeing [sic] him pain pain [sic] he never felt before she's the reason he's Dead."

"[S]abrina and [D]aniel did nothing but steal the buildings money and cause pain to people's lives."

"[S]abrina and [D]aniel drove Robert Moricone my very close friend to his death."

"[E]very employee who does not participate in Dan's and Sabrina's little crime syndicate—or who work here long enough to "know too much"are routinely fired."

"Daniel Neiditch is a CROOK he should be behind bars."

"We need to retaliate against Daniel Neiditch and Sabrina Mehmedovic. They killed Robert Moricone so now we should get revenge."

"[Y]es, he steals . . . Daniel Neiditch should be behind bars, he is the biggest crook in the world, he bribed the front desk with money all the time and threaten job security if they did not send him clients who were looking to rent or buy. "

"[O]ne of Roberts close friends whose name will stay unsaid was there when [S]abrina went up to his apartment hearing Rob say "look what you did to me look where this is leading!"

"[I]t breaks my heart to know that his death may have been caused by terrible, greedy people."

"Some don't like the word murder. I feel that you can call it whatever you want to call it, but I strongly feel that Dan and Sabrina and company are directly responsible for Robert's death. If they end up sued for $100,000,000 by Robert's family, that would not be a drop in the bucket toward bringing poor Robert back. And if Dan and Sabrina and company are capable of all of this, I believe that if under enough pressure they are totally capable of murder. We already know that they enter people's apartments when they are not home, they remove property, they could just as easily plant something in your apartment. Or just hide in your apartmet [sic] and wait for you to get home. These are not petty criminals we're dealing with. Bernie Madeoff [sic] stole people's money, but as far as I know he didn't enter people's homes or murder anyone. He was directly responsible for some suicides though, wasn't he."

On information and belief, the same false, defamatory statements were "twittered"; and masking sites maintained by GoDaddy.com identified above sent computer users to the post described in this paragraph.

16. By e-mail dated July 8, 2009, Plaintiff Daniel Neiditch wrote to Ning.com complaining specifically of the last quoted post in paragraph 23 above. Also, by letter dated July 8, 2009, legal counsel to Plaintiffs Daniel Neiditch and Sabrina Mehmedovic wrote to Ning.com:

"By this letter you are hereby on notice that the site contains outright false statements of fact, knowingly made, which are likely to damage those about whom the . . . statements are made. As such, the website contains defamatory and libelous remarks which could subject both those authoring such statements and those aiding in its publication to severe civil liability.

"We note with special severity, outright threats being made against individuals and insinuations correlating the tragic death of Robert Maricone [sic] with false allegations of the Atelier's board's conduct.

. . . .

"As attorneys we value free speech, assembly and the benefits of both, especially in a context that utilizes the gifts of modem technology in such a manner as to help elicit as much discussion, exchange and opinion as possible.

"We do not endorse the use of such technology irresponsibly or to damage people, however."

17. After the communications by Plaintiff Daniel Neiditch and counsel sent to Defendant.Ning.com, the campaign of harassing defamation continued. On July 9, 2009, at a site maintained by Ning.com, and further transmitted by Twitter, Inc. and GoDaddy.com, the following false statements were made, on information and belief, by Defendants Laura Qoku, Blerta Behluli, Sebastain Christopher and John Does 1 through 10:

"Maybe Robert wanted Sabrina to be there to watch him kill himself so that she would be even more haunted by what she has done to cause this, and she would have more vivid nightmares about how her and Dan's actions killed him this way."

On information and belief, the same false, defamatory statements were "twittered"; and masking sites maintained by GoDaddy.com identified above sent computer users to the post described in this paragraph.

There are no hard copies of any of the allegedly defamatory posts attached to the complaint and none were otherwise produced by Neiditch, Mehmedovic, or Respondent; thus the only evidence of the alleged libel and alleged interference with business relations to support the lawsuit are those excerpts from the websites and various posts, set forth above, which are quoted in the unverified complaint, as supplemented by the testimony at the instant hearing. It does not appear that there has been any discovery commenced with regard to the lawsuit or any further action taken in prosecution thereof.

On July 22, 2010, Christopher went to the courthouse and received assistance in filing a pro se answer to the lawsuit posing a general denial, asserting the action is frivolous, that the action is brought maliciously and requesting punitive damages in the sum of $85 million.

Dweck testified that he represents Neiditch and Mehmedovic in the lawsuit and that he did not charge nor did Atelier pay him for services rendered in connection with the lawsuit. Under questioning from the General Counsel it was established that at the time Dweck was representing Neiditch and Mehmedovic in the lawsuit over the alleged defamation, he was also representing Atelier and CSR in the present matter before the Board, writing position letters and attending at least one settlement conference. As Dweck explained, he was also counseling Neiditch and Mehmedovic at the same time as they were represented by Nesenoff and Miltenberg, LLP, but those lawyers were chosen to file the initial pleadings. He did not state why that was the case.

Neiditch's testimony about retaining counsel for the lawsuit was as follows:

Q. [by counsel for Respondent] Did you formally retain Mr. Miltenberg (sic)?
A. Yes
Q. Who pays or paid, if they were paid, Miltenberg?
A. Me personally
Q. And do you know who retained Jeffrey [Dweck] if anyone?
A. Me
Q. And who pays or will pay –
A. Me
Q. Has the obligation to pay Jeffrey?
A. I do
Q. And just to be clear does Atelier Condominium pay Jeffrey Dweck for this litigation?
A. Absolutely not.

Q. Has the Board in the past paid Jeffrey Dweck for this litigation that we are talking about ?

A. No

Q. Has the Atelier Board paid Miltenberg for their litigation of GC 13 or GC 9?

A. Absolutely not

Q. Why not?

A. Because it has no relevance to them

Q. Why do you say that.

. . . .

A. Because it's a personal lawsuit that I brought, not involving Atelier, the Square or anyone else, except the other people involved in the party: Sabrina and Rob's estate.

Dweck failed to attribute any statement alleged to be defamatory in the newly-filed complaint to Christopher. Neiditch testified that Christopher was named as a defendant in the lawsuit because: "we have reason to believe that he put up postings on the site." When asked what led to that conclusion, Neiditch stated, "Well, there was a posting up there with his name on it. And just [illicit] stuff that he was saying." When asked whether he had a copy of any such document, Neiditch replied, "Not on me, no." When asked where it would be, he replied, "It would have been on the site." Thus, Neiditch failed to specifically identify any such statement which might have appeared on any website, or in the lawsuit as originally or subsequently filed, which contained Christopher's name or was otherwise endorsed by him. From the text of the complaint, as set forth in detail above, there does not appear to be any specific statement which bears Christopher's name or otherwise would be clearly attributable to him. Christopher denied posting any material on any of the named websites or anywhere else relating to Moricone's death or the conduct of business at Atelier.

F. Neiditch and Respondent's Alleged Noncompliance with Subpoenas and General Counsel's Motions to Preclude Testimony and to Seek Sanctions

A subpoena ad testificandum addressed to Neiditch was served at the Atelier on October 3, 2011. The subpoena was sent via registered mail, and upon delivery it was signed for at the Atelier on October 5, 2011.[23] No petition to revoke this subpoena was filed.

Subsequently, the parties had a series of communications regarding the postponement of the hearing in this matter.[24] The parties agreed on a date of November 15, 2011. This date was agreed to after Respondent's counsel received confirmation from his client that this date was agreeable. On November 10, 2011, Respondent requested a further postponement of the trial, because Neiditch, a necessary witness, had plans to be out of the country on November 15. The General Counsel opposed the request and on November 10, 2011, Acting Associate Chief Judge Steven Fish issued an order denying Respondent's request for a further postponement, specifically noting that Neiditch was under subpoena to testify and that no motion to quash had been filed.

At the hearing, after the resolution of preliminary matters, the General Counsel called Neiditch as its first witness. He was not in attendance. At this time, in response to certain motions made by counsel for the General Counsel, Respondent pointed out that Neiditch's name had not been spelled correctly on the subpoena ad testificandum. [25] Respondent also claimed that it could not identify the individual who had signed the postal return receipt. Counsel for Respondent further represented for the record that, after speaking with Neiditch, his understanding was that Neiditch had not received the subpoena.[26]

Neiditch did attend the final day of hearing where, over the objection of the General Counsel, he was allowed to testify on behalf of the Respondent. In his posthearing brief, General Counsel argues generally that Neiditch's failure to comply with its subpoena ad testificandum warrants a preclusion order striking his testimony and unspecified adverse inferences. Although General Counsel cites authority to the effect that a preclusion order would have been warranted under Board law, acting in my discretion to fully develop the record, I allowed Neiditch to testify and hereby reaffirm that ruling.[27]

As will be discussed below, I have however, drawn certain inferences and conclusions from Neiditch's initial failure to comply with the subpoena ad testificandum.

On October 3, 2011, the General Counsel also served Respondent with a subpoena duces tecum seeking documents relevant to the lawsuits. Generally, the subpoena sought production of all documents (1) relating to Respondent's investigation of the alleged defamatory comments; (2) that would show who authored or authorized the alleged defamatory comments; (3) that will show the calculation of damages sought in the complaint and (4) that were filed in relation to the lawsuits. The General Counsel has requested that I strike those portions of Neiditch's and Dweck's testimony relating to the lawsuits based on Respondent's noncompliance with the subpoena. Again, I decline to do so.

Respondent argues that it did not have and did not produce documents responsive to the subpoena because the lawsuits were brought by Neiditch and Mehmedovic in their individual

[23] As General Counsel notes, the same individual signed the return receipt for the other subpoenas which were served upon the custodian of the records at the Atelier on the same day.

[24] As the record reflects, there had been prior postponements due to settlement discussions, religious holidays and the medical condition of one of Respondent's attorneys of record.

[25] The subpoena was addressed to "Dan Neiditich."

[26] The record reflects that courtesy copies of the subpoena had been sent to counsel for Respondent by regular and certified mail as well as by email.

[27] In this regard, the only specific argument claim of prejudice made by the General Counsel in connection with Neiditch's initial failure to appear that it was precluded from being able to call him as its first witness to confront him with a document which, as General Counsel asserts, was not produced pursuant to a valid subpoena. This document is an email where Neiditch recommends Christopher to perform side work for Lisandro, as has been discussed above. I overruled the Respondent's objection to this document and have noted that Neiditch admitted its content in his testimony.

capacities, and not as agents of Respondent.[28] This contention will be addressed below.

III. ANALYSIS AND CONCLUSIONS

A. General Credibility Principles

It is not unusual for an administrative law judge to credit some but not all of any particular witnesses' testimony, and this is the case here. Moreover, though I may have credited one version of events over another, that does not necessarily resolve the issue of whether the account offered by the credited witness is sufficient to show unlawful motivation or conduct or, alternatively, a defense to such allegations. Thus, the relative strength of the credited evidence is another matter to consider.

As a general proposition, there are certain principles regarding the assessment of credibility which guide my analysis here. In particular, while uncontradicted testimony need not be automatically accepted, the absence of any rebuttal to specific testimony is a significant factor to consider. "Although the Board may dismiss or disregard uncontroverted testimony, it may not do so without a detailed explanation." *Missouri Portland Cement Co v. NLRB*, 965 F.2d 217, 222 (7th Cir. 1992). In addition, it has been held that general denials will not ordinarily suffice to refute specific and detailed testimony from an opposing side's witness. See, e.g., *Williamson Memorial Hospital*, 284 NLRB 37, 39 (1987); *Emerson Electric Co. v. NLRB*, 649 F.2d 589, 592 (8th Cir. 1981). In a similar vein, a professed lack of recollection does not suffice as a rebuttal to detailed and specific testimony. *Indian Hills Care Center*, 321 NLRB 144, 150 (1996). See also *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials and comparative vagueness is generally insufficient to rebut more detailed testimony); *Mercedes Benz of Orlando Park*, 333 NLRB 1017, 1035 (2001), enfd. 309 F.3d 452 (7th Cir. 2002) ("It is settled that general or 'blanket' denials by witnesses are insufficient to refute specific and detailed testimony advanced by the opposing side's witness.").

Moreover, the Board has further found that when a witness fails to deny or only generally denies without further specificity certain testimony from an opposing witness an adverse inference is warranted. *LSF Transportation, Inc*., 330 NLRB 1054, 1063 fn. 11 (2000); *Asarco, Inc*., 316 NLRB 636, 640 fn. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996).

Bearing these general principles in mind, I have assessed the credibility of the witnesses herein, as discussed below

B. Independent 8(a)(1) Allegations

Section 8(a)(1) of the Act makes it an unfair labor practice "for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." In considering the lawfulness of communications from an employer to employees, the Board applies the "objective standard of whether the remark tends to interfere with the free exercise of employee rights." In determining whether an interrogation violates Section 8(a)(1) of the Act, the Board considers "whether under all the circumstances the interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act." *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This is an objective standard, and it does not turn on whether the "employee in question was actually intimidated." *Multi-Ad Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001); *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001).

Among the factors that may be considered in making such an analysis are the identity of the questioner, the place and method of the interrogation, the background of the questioning, the nature of the information sought, and whether the employee is an open union supporter. *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57 (2011) (incorporating by reference, in relevant part 353 NLRB 1294, 1295 (2009)); See also *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) (relevant factors include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation and the truthfulness of the reply).

In his posthearing brief, has counsel for the General Counsel identified several instances where unlawful conduct was alleged to have taken place. These involve allegedly unlawful interrogations as well as instances where employees were threatened with discharge and with unspecified reprisals for supporting the Union.[29]

In arguing that the instances of alleged interrogation by Neiditch or Mehmedovic were unlawful, the General Counsel contends that the coercive aspect of these encounters are highlighted by several factors including the fact that a number of these conversations included statements of hostility toward unions or union activities. *Parts Depot*, 332 NLRB 670, 673 (2000); *Cumberland Farms, Inc*., 307 NLRB 1479 (1992);

[28] There is one exception: an email chain showing various representatives of Respondent commenting on the websites, which has been discussed above.

[29] In his posthearing brief, counsel for the General Counsel alleges as unlawful certain promises of benefits made to employees. However, this allegation was not set forth in the complaint; nor was it referred to in the General Counsel's opening statement. Counsel for the General Counsel did not seek to amend the complaint at any time during the hearing, and these additional allegations surfaced for the first time in his post-hearing brief. I note that Respondent did not seek to question Neiditch or Mehmedovic about whether they either impliedly or explicitly promised benefits to employees to encourage them to forego unionization. Under these circumstances I find that these new allegations were not fully litigated and decline to consider them as independent violations of the Act. To the extent I credit witness testimony that such promises of benefits were made, however, I can and will consider them as evidence of animus in light of my findings and conclusions regarding the alleged 8(a)(3) violations here. See *American Packaging Corp*., 311 NLRB 482 fn. 1 (1993) ("law is well-settled that conduct that exhibits animus but that is not independently alleged to violate the Act may be used to shed light on the motive for, or underlying character of, other conduct that is alleged to violate the Act"); *Meritor Automotive*, 328 NLRB 813 (1999) (same).

Advance Waste System, 306 NLRB 1020 (1992). The General Counsel further notes that it was the manager involved who initiated the discussion of unionization, a further indication of coercive conduct. *Gloria Oil & Gas Co*., 337 NLRB 1120, 1122 (2002); *Sundance Construction Management*, 325 NLRB 1013(1998). Counsel for the General Counsel further points to the fact that in a number of instances the employees either did not answer or did not give truthful replies and declined to discuss the activities of others. See *Westwood Health Care Center*, 330 NLRB 935, 940 (2000); *Grass Valley Grocery Outlet*, 338 NLRB 877 fn. 1 (2003); *E-Z Recycling*, 331 NLRB 950 at fn. 6 (2000). Finally, the General Counsel contends that the totality of the circumstances, including the number of instances of alleged unlawful conduct viewed in light of other alleged unlawful threats taken as a whole imbued each individual conversation with heightened impact. *Westwood Health Care,* supra at 940. See also *Patagonia Baking Co*., 515, 516 (2003) (otherwise lawful interrogation occurring in the context of other unfair labor practices deemed unlawful); *Timsco, Inc*., 819 F.2d 1173 (D.C. Cir. 1987) (cumulative effect of seven exchanges found to be coercive).

As noted above, Respondent simply denies that any of these exchanges took place. Thus, Respondent points to testimony, elicited through guided questioning, that Mehmedovic denied having any conversation with Alovic or Alaj in 2009 regarding Local 32BJ or with any employees regarding their support for the Union in March 2009, April 2009 or June 2009. Neiditch did not speak with either Christopher or Alovic about Local 32BJ or unions in 2009. He spoke with no other employees in 2009 regarding Local 32BJ. Respondent further relies upon testimony adduced from Perez and Lopez regarding the fact that neither Mehmedovic nor Neiditch ever spoke to them about the Union.

As a general matter, I find the broad denials issued by Mehmedovic and Neiditch are not sufficiently convincing from an evidentiary standpoint to rebut certain other specific testimony proffered by the General Counsel's witnesses. While I am cognizant that this puts Respondent in the difficult position of proving a negative, the General Counsel adduced sufficient detail about various interactions such as timeframe, place, the presence of other individuals and specific testimony as to what was said which would have enabled Respondent's clearly skilled counsel to adduce factually-based denials. Certain of these alleged interrogations involved both Mehmedovic and Neiditch and here I find that they would have been in a position to offer mutually corroborative substantive evidence to rebut the testimony proffered by the witnesses for the General Counsel, but failed to do so.

In addition, I found Mehmedovic to be evasive and dissembling.[30] Moreover, when she actually did offer affirmative testimony regarding a discrete event it was presented in an exaggerated fashion that generally did not have the ring of truth.

As for Neiditch, I find his initial failure to appear as required by the subpoena ad testificandum issued to him demonstrates a lack of regard for Board processes which, in my view, detrimentally impacts upon his credibility. He, too, was needlessly evasive on various occasions. For example, during his cross-examination, the General Counsel sought to adduce evidence that Neiditch was known at the Atelier, seemingly to rebut Respondent's suggestion that the minor misspelling of his last name had adversely affected proper service of the subpoena. When questioned whether he was known at the building, Neiditch responded, "I don't know what the definition of that is. By who?" As there is no dispute that Neiditch lives, owns property, runs a real estate brokerage business from an office at and is president of the Board at the Atelier, such a response is frivolous. In addition, whatever scant testimony Neiditch offered regarding the basis for including Christopher in the lawsuit lacked specificity and at times seemed to border on palpable scorn. When asked whether he maintained a copy of the post allegedly authored by Christopher, Neiditch replied, "Not on me, no."[31] When asked whether he had written the letter to his fellow homeowners which is set forth above, Neiditch hedged, responding, "[p]ossibly, but I don't recall." It was only after being shown the letter in question that Neiditch was compelled to acknowledge authorship of it. Under all the circumstances here, I cannot credit the apparent contention that Neiditch would have failed to recall writing this very extensive letter, about clearly serious and sensitive matters, to the residents of Atelier.

By contrast, I credit the testimony of Alaj regarding his interrogations by both Neiditch and Mehmedovic, (as well as the promise of benefits made to him should he forgo unionization). As an initial matter, while I note that Alaj is Alovic's brother, I also have considered that he is a current employee who appeared pursuant to subpoena. As the Board has acknowledged, when a current employee offers testimony contrary to the interests of his or her employer, such testimony tends to be reliable. As the Board has stated: "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests . . . [t]hus, a witness' status as a current employee may be a significant factor, but it is one among many which a judge utilizes in resolving credibility issues." *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006), citing *Flexsteel Industries*, 316 NLRB 745 (1995),

[30] By way of example, when asked if she was familiar with Local 32BJ, Mehmedovic pointed to the fact that family members had been members of that union. In light of the fact that it is undisputed that the Union has sought to represent the building service employees at the Atelier for years, that CSR has numerous collective-bargaining agreements with the Union and that the instant matter involves employees allegedly fired for their support for Local 32BJ, I find this answer to be nonresponsive and deceptive.

[31] I would be hard-pressed to find this to be a serious or thoughtful answer to a clearly germane question going directly to the issue of whether there was some legitimate basis for naming Christopher as a defendant in the lawsuit. In this regard, I note that while Respondent has argued that it is not responsible for the lawsuit, a claim which will be addressed below, Respondent has also raised a number of affirmative and substantive defenses to the allegations of the complaint, which such evidence would tend to support.

enfd. 83 F.3d 419 (5th Cir. 1996); *International Automated Machines*, 285 NLRB 1122, 1123 (1987). See also *Bloomington-Normal Seating Co*., 339 NLRB 191, 193 (2003) (when employees testify contrary to the interests of their employer, they subject themselves to the possibility of recrimination and the perils of such are greater if such testimony should prove to be false).

Aside from any such legal presumptions, however, I found Alaj to demonstrate an impressive demeanor during his testimony: he was direct and forthright and his testimony contained specific details relating to his encounters with the members of management at issue.

Thus, Alaj testified to two encounters, which are set forth above. One took place in February or March 2009 while Alaj was stationed at the front desk of the lobby. Both Neiditch and Mehmedovic were present on this occasion and Neiditch asked Alaj if he wanted the Union and pressed him to explain why. I note that at this point in time Atelier management would have had no way of knowing whether Alaj was a supporter of the Union, and there is no evidence that he held himself out as one until he responded to Neiditch's questioning. I find that the circumstances of this interrogation, conducted in tandem by the Board president and the property manager—the most highly ranked supervisor at the building—was sufficiently coercive to be unlawful. Adding to the coercive atmosphere created by the initial questioning was the fact that Neiditch persisted in probing whether Alaj would forgo unionization if the benefits at the building were to improve.

In rejecting Respondent's general denials, I also find that it would be unlikely for Alaj to fabricate testimony regarding an interaction with two members of management. Neiditch and Mehmedovic could have provided specific, corroborative testimony that no such interrogation took place. Their failure to do so is telling.

The second instance of alleged interrogation involving Alaj took place in June, apparently in response to the receipt of the Union petition. Mehmedovic called Alaj, told him she knew that employees had signed for the Union and asked him who the ringleaders were. She further inquired as to how he had come to sign for the Union. Again, these questions, about Alaj's Union activities and those of others, which Alaj sought to avoid answering, coming from the most highly placed employer representative at the facility and initiated by her, would reasonably tend to restrain, coerce or interfere employees with rights guaranteed by the Act.

Accordingly, I find that by interrogating Alaj in about March and again in June 2009 about his union activities and the union activities of others, Respondent violated Section 8(a)(1) of the Act.

I further credit Christopher's testimony that on certain occasions he was interrogated, particularly by Neiditch, about the Union. In this regard, I found Christopher to be a generally credible witness who exhibited a serious and thoughtful demeanor. In its posthearing brief, Respondent argues that during his cross-examination Christopher demonstrated "evasive testimony which was commented upon by Judge Landow as casting doubt over its veracity." I have reviewed the cited portion of the transcript carefully in light of Respondent's contentions. It is true that at that point I was obliged to give a specific instruction to Christopher to confine his answers to what was asked of him and further advised him that his refusal to do so could raise questions about his testimony. However, this was a cautionary instruction to a lay witness, who exhibited a measure of emotional distress during his testimony and who appeared to be reacting to the apparent implications of the questions asked of him rather than any sort of comment on his credibility in general.

I credit Christopher's account of his January 2009 automobile ride with Neiditch.[32] Admittedly, this is prior to the onset of organizing by employees as testified to by Christopher and Alovic. However, I note that the Union had by then contacted management seeking to meet to discuss the representation of building service employees and that this matter had been the subject of discussion in at least two board meetings. Thus, the fact that the Union sought an entry into the Atelier was well known to management.

Moreover, Christopher provided sufficient probative detail about this encounter so that Neiditch could have been questioned about, and provided a specific denial to Christopher's assertions, which he failed to do. As for the substance of the encounter, I find that the circumstances were coercive. Christopher was not yet known as a prounion employee and he was being questioned by the president of the board of managers of (and stipulated supervisor at) the building. The questioning took place in an enclosed automobile with no other individuals present and was coupled with an expression of antiunion sentiment. Under these circumstances, I find the interrogation was coercive. See *Advance Waste Systems*, 306 NLRB 1020 (1992).

I further credit Christopher's account of a subsequent interrogation, which occurred sometime after he signed a Union card. On this occasion, Neiditch, not only asked Christopher whether he wanted a union, but also stated that Mehmedovic did not want a union in the facility and further stated that management was trying to give employees a pay raise. Again, Neiditch did not offer a specific denial to this detailed account of their discussion. I find that even though Christopher had identified himself as a union supporter by that time, the ancillary comments made by Neiditch, which impliedly offered benefits should employees forgo unionization, contributed to the coercive nature of this discussion sufficiently to place it within the ambit of Section 8(a)(1) of the Act.

Accordingly, I find that on both of these occasion, Neiditch unlawfully interrogated Christopher about his union activities

[32] Contrary to the suggestion of the General Counsel on brief, Christopher testified that this took place in January, not March. While the complaint does not allege that any interrogation of employees took place in January, considering the record as a whole, I find that this matter was fully litigated at the hearing. In particular, Respondent adduced denials from Neiditch that he spoke with Christopher or Alovic in 2009, and did not limit this inquiry to any specific month.

in violation of Section 8(a)(1).[33]

In addition, I generally rely on Alovic's testimony of an encounter in the building lobby occurring in March where Neiditch initially stopped by to question Alovic about his business cards. Shortly after, Mehmedovic joined them and the conversation shifted to the Union and Mehmedovic accused Alovic of trying to bring the Union into the building, and told him that no union could protect him should he be fired. Neiditch told Alovic to "be careful." Alovic was also asked about Christopher's support for the Union. Again, this is a situation where two management officials, in a position to mutually corroborate each other, offered no specific evidence to counter Alovic's detailed account of this conversation. I additionally find it inherently improbable that Alovic would have fabricated such a story from whole cloth. The coercive nature of this interrogation is enhanced by the fact that the two managers participated in the questioning in tandem, Alovic was asked about the union activities of other employees and that statements about the union's inability to protect employees from discipline were made.

In addition, Neiditch's admonition to Alovic to "be careful" adds to the coercive nature of the foregoing exchange. The Board has held that admonitions to an employee to "be careful" or other similar words, in the context of a union organizing campaign "convey[s] the threatening message that union activities would place an employee in jeopardy." *Gaetano & Associates*, 344 NLRB 531, 534 (2005); *St. Francis Medical Center*, 340 NLRB 1370, 1383–1384 (2003) (supervisor's statement to employee to "be careful" in context of union activity held to be unlawful); *Jordan March Stores Corp*., 317 NLRB 460, 462 (1995) (supervisor's statement to "watch out" are unlawful implied threats). Based on the foregoing, I find that Respondent interrogated Alovic about his union activities and those of other employees, and threatened him with unspecified reprisals for his support of the Union in violation of Section 8(a)(1) of the Act.

However, I fail to conclude, as General Counsel contends, that Mehmedovic specifically threatened Alovic with discharge on this occasion. While Alovic testified on direct examination that Mehmedovic stated that he would be fired for bringing in the union, such a claim is not present in his pretrial affidavit. Respondent argues that this discrepancy is sufficient to discredit Alovic entirely, but I do not agree with this assertion. I note that the relevant portions of Alovic's affidavit read into evidence by Respondent, apart from this one omission, otherwise corroborates his testimony about what was said to him on this occasion. Although I think it is entirely possible that Alovic may have understood Mehmedovic's comments to be tantamount to a threat of discharge, it is also possible that he elaborated this incident in his subsequent recollection based upon other comments Mehmedovic made at the time. In this regard, I note that the General Counsel failed to obtain an explanation from Alovic pertaining to the discrepancy between his testimony and his pretrial statement. In sum, I have concluded it is appropriate to adopt the version of events as initially stated by Alovic in his affidavit, which were made at a time far more proximate to the events in question. Accordingly, I find that Mehmedovic did not unlawfully threaten Alovic with discharge, as alleged in the complaint.

Alovic further testified that in late April, he was in the lobby with Mehmedovic. She asked him if he had been the one to bring the Union into the building. When Alovic stated he did not know anything about it, Mehmedovic persisted and asked who had signed cards. Alovic again demurred. Mehmedovic persisted and in the face of Alovic's silence, eventually retreated to her office. There was no specific denial on Mehmedovic's part to any of the particular allegations made by Alovic as to their encounter on this occasion. Again, I find that this persistent interrogation by the resident manager as to the union activities of Alovic and other employees was in violation of Section 8(a)(1).

The record reflects that in June, after the Union sent its letter with the employee petition attached, other violations of Section 8(a)(1) occurred. In particular, Mehmedovic asked Alovic about the petition and when he acknowledged that he had signed it, asked him who had brought it to the building. Alovic denied knowing who had showed it to him. Mehmedovic stated she will see who signed it and "we will see what happens." I find under the totality of the circumstances this exchange was sufficiently coercive to constitute an unlawful interrogation.[34]

Alovic also testified to two interactions with Moricone in June which will be discussed in conjunction with the analysis of his discharge.

C. The Alleged Unlawful Discharges

1. The *Wright Line* standard

Allegations of discrimination which turn on Employer motivation are analyzed under the framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To establish a violation of Section 8(a)(3) under *Wright Line*, General Counsel must first show, by a preponderance of the evidence, that the employee engaged in protected concerted activity, the employer was aware of that activity, and the activity was a substantial or motivating reason for the employer's action. *Wright Line*, supra; *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services,* 343 NLRB 1183

[33] On a third occasion testified to by Christopher, it appears that he initiated the discussion of the Union in response to Neiditch's remark that he looked sad. By that time, Christopher had already declared his support for the Union to Neiditch. Accordingly, I decline to find that Neiditch coercively interrogated him on this occasion.

[34] Citing *Saint Jean Des Pres Restaurant*, 279 NLRB 109, 118 (1986), counsel for the General Counsel asserts that Mehmedovic's comment constitutes a threat of unspecified reprisals. Had this been alleged in the complaint, I would agree. While I make no independent finding of a violation, which would be cumulative in any event, I find that such comments constitute evidence of antiunion animus. *American Packaging Corp*., supra; *Meritor Automotive*, supra.

(2004); enfd. mem. 179 LRRM (BNA) 2954 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003); The Board has long held that where adverse action occurs shortly after an employee has engaged in protected activity an inference of unlawful motive is raised. See *McClendon Electrical Services*, 340 NLRB 613, fn. 6 (2003) (citing *La Gloria Oil*, 337 NLRB 1120 (2002), enfd. mem. 71 Fed Appx. 441 (5th Cir. 2003). As part of its initial showing, the General Counsel may offer proof that the employer's reasons for the personnel decision were pretextual. *Pro-Spec Painting, Inc*., 339 NLRB 946, 949 (2003); see also *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D. C. Cir. 1995); *Real Foods Co*., 350 NLRB 309, 312 fn. 17 (2007) (unlawful motivation demonstrated not only by direct, but by circumstantial evidence such as timing, disparate or inconsistent treatment, expressed hostility, departure from past practice and shifting or pretextual reasons being offered for the action). In addition, proof of an employer's animus may be based upon other circumstantial evidence, such as the employer's contemporaneous commission of other unfair labor practices. *Amptech, Inc*., 342 NLRB 1131, 1135 (2004).

Once the General Counsel establishes its prima facie case, the burden of persuasion then shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Septix Waste*, *Inc*., 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004); *Wright Line*, supra. To meet its *Wright Line* burden, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W.F. Bolin Co*., 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996). See also *Manno Electric, Inc*., 321 NLRB 278, 280 fn. 12 (1996).

2. Application of the *Wright Line* standards

I begin here with a general discussion of the General Counsel's prima facie case as relates to both Alovic and Christopher and will then analyze the circumstances surrounding their discharges individually.

As has been discussed above, the General Counsel has adduced evidence of Alovic's and Christopher's activities in support of Local 32BJ. Alovic and Christopher were the two individuals who made contact with the Union and solicited the support of their coworkers. Alovic distributed, and both he and Christopher collected authorization cards and Christopher obtained employee signatures for the Union's petition. I have credited Christopher's testimony that, as early as January, he told Neiditch that he supported the Union. I find that Mehmedovic's interrogations of Alovic tend to suggest that she thought he was involved as well. Neiditch also admonished Alovic to "be careful." I further note that that neither Mehmedovic nor Neiditch denied knowledge of the Union activities undertaken by these employees.[35]

And certainly, once the petition was presented to the Board of Managers in early June, Respondent was clearly aware that both Alovic and Christopher supported Local 32BJ. In response, Mehmedovic confronted Alovic demanding to know who had brought the petition to the facility, assuring him she will find out who had done so and that "we will see what happens." Mehmedovic also demanded that Alaj tell her who the ringleaders were.

The General Counsel has also adduced evidence of animus toward these employees' organizing activities. I rely in part on the history of Respondent's support for Local 670, notes of minutes in which Board members express a preference for Local 670 as opposed to Local 32BJ and the credited evidence of comments made by Neiditch to Christopher about management's preference that there not be a union at the facility. In particular Neiditch told Christopher that management did not want a union and impliedly promised him a raise if he were to forego the Union. As discussed in further detail above, there were repeated interrogations of Alaj, Alovic, and Christopher by Mehmedovic and Neiditch both before and after the Union sent its petition to the board of managers. These independent 8(a)(1) violations constitute evidence of animus. See *Austal USA, LLC*, 356 NLRB No. 65, slip op. at 1–2 (2010).

Moreover, it cannot escape notice that both Alovic and Christopher were discharged shortly after the presentation of the Union's petition to the board of managers. Timing of an employer's action has long been considered as evidence of unlawful motive. *Manorcare Heath Services–Easton*, 356 NLRB No. 39 slip op. at 3, 25 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011) (discipline of employee "just days" after initial public support for the union indicative of unlawful motivation); *La Gloria Oil & Gas Co*., 337 NLRB 1120, 1124 (2002); *Howard's Sheet Metal, Inc*., 333 NLRB 361 (2001). In this regard, I note that both Alovic and Christopher were long-term employees of the Atelier, who had been specifically recruited to work there by Moricone, who clearly was familiar with their work history.

Respondent attempts to rebut this evidence by arguing that, had Alovic and Christopher actually been fired for their Union activities, the "next logical and expected step would have been for Local 32BJ to file a new unfair labor practice charge, as they had when their earlier organizing campaign had been allegedly impaired." Respondent further argues:" [w]ith the settlement agreement obtained by Local 32BJ, signed cards from the majority of the workforce and the discharge of the two allegedly lead organizers the pursuit of injunctive relief and a bargaining order should have been a virtual certainty." Respondent thus argues that I infer from this failure to take action that Local 32BJ viewed the discharges of Alovic and Christopher as legitimate.

I decline to draw the conclusion Respondent suggests from

[35] Neither Mehmedovic nor Neiditch testified about the Union's June petition, and it appears from the scant records produced by Respondent pursuant to subpoena that there was no discussion about it in any subsequent meeting of the Board of Managers. I must note that I question whether this would have been the case, as it seems to me to be more likely than not that there would have been some discussion of such matters at a meeting of the Board.

such a categorical negative implication. There is nothing in the record to support these assertions, and such speculation in the absence of evidentiary support is unwarranted. I further note that, whatever opinion Local 32BJ may have regarding the discharges, Alovic and Christopher each have individual rights under the Act to seek an investigation of their claims and redress before the Board. The determinative factor here is not what Local 32BJ may believe or not believe or whether, as Respondent suggests, the Union slept on its rights, but what the probative and credible evidence adduced at the hearing establishes.

Respondent further suggests that the activities of the Atelier Board of Managers rebut any implication of anti-union animus. Respondent relies on the fact that emails sent in May 2008 indicate that the costs of a union contract with Local 32BJ had already been taken into account in the building's budget by CSR (and Kotler in particular). However the minutes of the June 2008 meeting of the Board also establish that when Kotler suggested that Neiditch meet with Local 32BJ, Neiditch responded by stating that Local 670 would be less expensive for the building. It was only when he was informed that Local 670 would not be interested in the Atelier that Neiditch agreed to meet with Local 32BJ. In fact, there is no evidence that he ever did so. Then, in the November 2008 Board meeting, when Kotler inquired as to the status of a contract with Local 32BJ, Board member Gohari again brought up Local 670, suggesting a contract with that union as it would be less expensive. Again, Kotler was obliged to explain that Local 670 will not get involved at the Atelier. The Board then discussed current employee wages and benefits and decided to hold off on signing a contract at that time. Thus, viewing the evidence in the light most favorable to the Respondent, it appears that while Kotler, and quite possibly CSR, accepted the reality that Local 32BJ was a force that would have to be reckoned with, the Atelier Board members resisted dealing with the Union and decided to defer doing so, primarily for financial reasons.

To the extent Respondent attempts to argue that evidence of animus is undercut by the fact that other employees testified that they were not spoken to about the Union or that other signatories to the petition were not disciplined or discharged, such arguments are unpersuasive. The Board has long recognized that a failure to retaliate against all who engage in protected conduct does not preclude a finding of unlawful motivation as to others. See *Volair Contractors, Inc.*, 341 NLRB 673, 676 fn. 11 (2001). Moreover, here it is unrebutted that Alovic and Christopher took a preeminent role in organizing on behalf of Local 32BJ.

Accordingly, I conclude that the General Counsel has established the elements of a prima facie case as to union activity, employer knowledge and animus toward Alovic and Christopher's protected conduct. Under *Wright Line*, the burden now shifts to the Respondent to prove, by a preponderance of the evidence, that it would have discharged these employees notwithstanding their protected conduct.

3. Alovic

Respondent urges that I discredit Alovic's "decidedly unique accounting" of his activities on June 19, which ultimately led to his discharge. In this regard, Respondent points to the purported inconsistencies between Alovic's testimony at the hearing and that which was provided in his affidavit to the NLRB during its investigation of his unfair labor practice charge.[36]

Respondent also points to certain inconsistencies in Alovic's testimony at the hearing. In particular, Respondent contends that Alovic's testimony, adduced on cross examination, that he left union cards in the employee cafeteria on the evening of June 18 for employees to sign and return to him the next day (and which were seen by Moricone) is counter to his testimony that the efforts to collect union cards ceased in early May 2009. Thus, as Respondent alleges, Alovic's testimony that he was leaving cards for employees in June should be discredited, as should his account of what Moricone told him. Respondent further argues that Alovic's testimony as to the conversation he had with Perez upon his return from the employee cafeteria is not worthy of credit. While Alovic testified that he told Perez he was going on his break prior to leaving his post, on his return he failed to inquire why Perez was repeatedly asking about his whereabouts. Respondent argues that Perez's testimony should be credited, and that her account of events is corroborated by the incident report she wrote contemporaneously to the events in question.

In urging that I discredit Alovic, Respondent further points to Habib's testimony that he saw Alovic in the employee cafeteria at approximately 1:45 or 2 on June 19 and that Alovic engaged in a verbal altercation with Moricone which culminated in his cursing at Moricone and throwing food in the cafeteria.

In short, Respondent argues that the bulk of the credible evidence shows that Alovic was discharged for engaging in offensive, disruptive and aggressive behavior in the building lobby, including telling Perez to "mind your own fucking business," thus intimidating both Perez and three clients who were waiting to see Neiditch. Respondent further contends that Alovic had previously been warned about similar conduct in the past and had been informed that future misconduct would result in his termination. As Respondent argues, there is no credible evidence which links his discharge to any Union activity.

In arguing that there is insufficient probative evidence to meet Respondent's burden under *Wright Line*, General Counsel relies on the version of events reported by Alovic: that there was a protocol by which the doorman and concierge would relieve each other for meal breaks; that Alovic followed this protocol on the day in question; that Moricone came to the employee cafeteria at about 12:25 p.m. complaining that Perez kept calling him asking for Alovic's whereabouts and that, upon being informed that Alovic was taking his lunch break, Moricone said "OK" and left the cafeteria.

Later that afternoon, at about 2 p.m., after Perez had returned from her break and Alovic returned to the door, Moricone came

[36] As noted above, the only inconsistencies in the record adduced by Respondent in this regard concern Alovic's testimony that Mehmedovic expressly threatened him with discharge.

to him and stated that Alovic had worked for him a long time, that he had seen cards in the cafeteria, and asked him if he was the one trying to bring in the Union. Alovic claimed not to know anything about it, but Moricone persisted asking if he was the one who signed the card. Alovic admitted he had, and Moricone then went to Mehmedovic's office. Moricone then came out shortly thereafter and discharged Alovic, making reference to his support for the Union.

Although, as discussed above, I have credited certain aspects of Alovic's testimony, I find that his account of events leading to his discharge is inherently unlikely, and the General Counsel has failed to adduce sufficient evidence to establish otherwise or explain the improbabilities. As Respondent has noted, the signing of authorization cards for the Union had been concluded the prior month. Alovic failed to explain and General Counsel fails to offer any reason as to why Alovic or anyone else would be leaving cards for employees in the employee cafeteria at this point in time. In this regard, I note that earlier in his cross-examination, Alovic testified that he spoke with employees for about 2 weeks about signing cards, that it continued to May 2009 and that he was then done. In addition, I do not think inherently likely any employee would have just left the Union cards sitting on the table, in the open, in an area where they would surely have been seen by Moricone and possibly by other supervisory personnel. By June 19, the Union petition had been delivered to the Atelier. Alovic's name, along with others, was listed. There would have been no reason for Moricone to have extensively interrogated Alovic on this occasion as to whether he had signed a Union card when his support for the Union would have been apparent.[37] Thus, I fail to credit Alovic's version of events and conclude, as Respondent suggests, that he engaged in some misconduct on the day in question, and is trying to conceal that. This does not end the inquiry, however, because Respondent has the burden of establishing, by a preponderance of credible evidence, that not only did Alovic engage in misconduct, but that it would have fired him for this misconduct absent his union or other protected activities.

I begin first with a discussion of Alovic's prior discipline. As noted above, Alovic testified that his only prior discipline was a three day suspension in January when both he and Qoku were accused of abandoning their posts. Respondent relies on Alovic's admission that Mehmedovic had warned him that he would be fired for subsequent infractions, but I do not find this necessarily dispositive. As I have noted above, Mehmedovic tends to speak in exaggerated terms. Moreover, the disciplinary records introduced into evidence by the General Counsel show warnings to employees for various infractions which purport to be so-called "final warnings" intended to result in serious discipline upon further violations, but which in actuality did not result in suspension or termination upon the next event.[38] Thus, it appears from the record that Respondent's pattern and practice of disciplining employees is somewhat arbitrary and neither Mehmedovic nor Neiditch offered any evidence to rebut this conclusion.

I credit Alovic's testimony that he never saw the April 6 disciplinary notice prepared by Mehmedovic. It is not signed by him, and I note that as demonstrated by the other disciplinary notices in the record, and as Christopher's testimony reflects, Respondent generally made a practice of having employees sign such notices when they were administered. The vast majority of employee write ups in the record before me are signed by the employees to whom they were issued (GC Exhs. 21, 24, 25, 26). I also note that Mehmedovic failed to offer any testimony about this warning, or any specific testimony about the misconduct which culminated in her preparation of the April 6 disciplinary notice notwithstanding the fact that it was written and signed by her. Her only comment was that it had been maintained in Alovic's personnel file. Again, as the manager who actually wrote the warning, I find that Mehmedovic would have been in the best position to explain the underlying events or misconduct giving rise to such, and find such an omission and her otherwise nonspecific testimony fails to sufficiently rebut and actually tends to support Alovic's version of events. As has been noted above, a witnesses' failure to provide specific testimony about such disputed matters will support an inference that such testimony, if truthful would not support the propounded version of events. See *LSF Transportation*, supra at 1063 fn. 11; *Asarco*, supra at 640 fn. 15. Moreover, here Mehmedovic failed to offer any specific evidence to show that Alovic had a history of misconduct, as Respondent has alleged.

As for Alovic's alleged misconduct on the day of his discharge, Respondent relies largely on Perez's account of events and her incident report. Indeed, Perez's account is quite detailed. It is, however, inherently improbable in some respects and at other times not corroborated by additional evidence adduced in this record, in particular by Respondent's own witnesses.

Thus, according to Perez, at about noon, Alovic disappeared

[37] For the foregoing reasons I decline to find that Moricone unlawfully interrogated Alovic about his union activities and the union activities of others. As there is no other evidence that Moricone interrogated any other employee about the Union, I recommend dismissal of these allegations of the complaint.

[38] For example Qoku, the employee suspended with Alovic in January was, like Alovic, given a "final warning" at that time. She then received another "final warning" in March for several infractions including leaving her post unattended. The warning states: "Today on March 11, 2009, the last verbal warning and written notice is given. If this pattern persists Laura will be terminated." Qoku was terminated in May, but her discharge letter cites seven incidents between her suspension in January and her discharge in May, five of which occurred after the March 11 "final warning." The penultimate incident occurred on May 9 when the Mehmedovic noticed Qoku was missing during her shift and Moricone waited for her for a period of some 2 hours. Finally, on May 13, Qoku arrived 40 minutes late for her shift. Mehmedovic and Moricone met with her to obtain an explanation for her actions and when she failed to provide one, a decision was made to terminate her. (GC Exh. 25.) Another employee, Vincent Polo, received a "final warning" for tardiness in March, and warned that further infractions would result in suspension or termination. In August he was again given a written warning for similar infractions. (GC Exh. 24.)

from his post and she noticed his car, usually parked out front, was missing. About 20 minutes later, Moricone asked where Alovic was and Perez stated that she thought he might have been in the restroom. Of course, if this was a typical hour for a lunch break, it is open to question as to why Moricone would have been inquiring as to Alovic's absence in the first instance. In any event, as Perez testified, she failed to tell Moricone that Alovic's car was missing, and did not explain in her testimony why she failed to mention that to him. I find it unlikely, if Alovic's car was gone, and he was missing without explanation, that Perez would have assumed he was using the restroom or that she would not have reported this to Moricone at the time. Another unlikely aspect of Perez's account is the fact Moricone did not call Alovic, and while Perez asserts that she did, she failed to leave any message for him.

According to Perez, building service personnel continued to notice and comment on Alovic's absence over the next two hours. Both she and Ozey tried to call him. After he was gone for close to two hours, Perez called Mehmedovic and Neiditch. Neiditch came downstairs to wait for Alovic, who eventually arrived back at his post.

At this time, as Perez recounts, Alovic was directed to go to the backroom by Neiditch and after he emerged he began pacing, screaming, slamming drawers and cursing at her in the presence of three of Neiditch's clients. Perez then called Mehmedovic and Moricone. Moricone then escorted Alovic to the backroom.

Perez asserts that she recorded all of this contemporaneously, in her incident report. I do not credit her in this regard. I sincerely doubt that she would have had the time, given the lateness of the hour, the time her shift ended (3 p.m.) and the fact that she was the only concierge on desk duty at a large building for the entire period of time, during which she did not take any personal or meal breaks. I find it far more likely that this report was written after-the-fact, in an attempt to assist Respondent document the reasons for Alovic's discharge.[39] However, even if I were to credit Perez to the effect that she wrote her account at the time she asserts, I would still find that it is in some respects uncorroborated and, in fact, contradicted by other evidence in the record.

Contrary to Perez, Neiditch failed to testify that he had any involvement in the Alovic incident, and stated that he only learned of it when Mehmedovic called to inform him that Alovic was to be fired. He did not corroborate Perez's testimony that she called him to the front desk where he waited for Alovic to return, or that he instructed Alovic to report to the "back room" or Mehmedovic's office. I find that this is something Neiditch would have recalled, had it actually occurred. I additionally note that Neiditch did not testify that his clients reported any unusual occurrence in the lobby as they waited for him on this occasion.

Although Habib offered testimony about an altercation between Alovic and Moricone which took place in the employee cafeteria, which culminated in Alovic cursing and throwing food, these contentions, which were not part of Habib's initial testimony, are not supported by Moricone's memorandum to Mehmedovic which memorializes the reasons for Alovic's discharge. In this memorandum, Moricone states that: Alovic left his post without informing Perez, that he was not present at his post for more than one hour (not two hours, as claimed by Perez); that Alovic was found in the cafeteria, only partially in uniform and speaking with employees; that Mehmedovic and Moricone spoke with both Perez and Alovic; that Perez complained that Alovic was slamming the doors at the concierge desk, telling to keep her "FN" mouth [shut]; that Moricone proceeded to the lobby and witnessed his "terrible behavior" which Perez stated had been worse prior to his arrival and that Alovic continued to act "out of line" and "carry on with hostility." Thus, Moricone asked Alovic to collect his belongings and leave the building. There is no mention of any altercation, food-throwing or cursing in the employee cafeteria.

While I find that Moricone's email to Mehmedovic, written one week after Alovic's discharge, has some self-serving and possibly exaggerated elements to it, I do think that it offers some insight into what happened on that day. In reaching this conclusion I have considered the varying accounts, or lack of clarity in the accounts offered by various witnesses, and the extent to which they corroborate each other. Thus, based upon the record as a whole, I conclude that Alovic did disappear from his post without checking with Perez; that Moricone later found him in the employee cafeteria; that Alovic became angry with Perez for reporting him to management and slammed the drawers at the concierge desk and cursed at her. While I find that Alovic did engage in some measure of misconduct on that day, I have also concluded that the account offered by Respondent is exaggerated and, in some respects, false.

In discrediting Respondent's account of events, I note that Mehmedovic testified that during the meeting she and Moricone held with Alovic, Alovic was cursing and screaming to such an extent that Ozey (who was also present) had to take him downstairs. Apart from the fact that I have found Mehmedovic to be an unreliable witness with a propensity for hyperbole, her account is not corroborated by anything in Moricone's report about Alovic's conduct on that day, and I do not credit it. I find further evidence that Respondent's characterization of Alovic's misconduct is pretextual in comparing Mehmedovic and Neiditch's account of their discussion regarding Alovic's termination. As Mehmedovic testified, she told Neiditch that she could not believe it, that Alovic was acting up again, that they could not have this anymore and that Moricone was furious and was going to terminate him. As Mehmedovic testified, Neiditch concurred that they had to do what was best for the building. However, Neiditch testified that he asked Mehmedovic to give Alovic another chance. Had Alovic's conduct been as outrageous as Respondent now suggests, and

[39] Respondent has asserted that Perez and Habib are "disinterested witnesses." I do not necessarily find these current employees to be disinterested. Rather, it could be argued and common sense suggests that under the circumstances of this case, where the charging parties are individuals without any power or authority to protect these current employees, their pecuniary interests lie in supporting the account of events suggested by their employer.

this had been reported to Neiditch at the time, I do not think Neiditch would have done so.

Having made the foregoing credibility resolutions, I must now conclude whether Respondent has met its burden under *Wright Line*. In examining the record as a whole, I find that it has not.

I note that during the meeting immediately preceding his termination, as Mehmedovic admitted, Alovic invoked his right to union representation when he claimed to be entitled to a lunch break, and angrily stated that a "representative" would bring him back to work. Mehmedovic clearly showed that she knew what Alovic was referring to when replied that no union would bring him back.

In arguing that Respondent has not met its burden under *Wright Line*, the General Counsel points to the disciplinary record of Blerta Behluli (GC Exh. 26), asserting that it shows disparate treatment toward Alovic. Behluli's personnel record contains notations of a variety of infractions which occurred prior to her discharge on May 27. For example, there is a complaint from a building tenant that on February 12, Behluli told him to "go fuck yourself" and had to be restrained as she tried to hit him. She subsequently received a "second warning" on March 20 for handing out keys without having them signed for. On May 7, she received a "final warning" for not being at her post and smoking in the employee cafeteria. On May 21, Behluli received another "final warning" for an incident on May 19 which included "us[ing] inappropriate language and causing a scene in the lobby." When asked to leave the lobby, Behluli, "refused and continued to carry on in an unprofessional manner and continued to curse while pacing back and forth in the lobby in a manner that was full of rage." Then, on May 28, Mehmedovic received an email from a tenant complaining that one of his guests overheard Behluli using racial epithets. Only then was she terminated.[40]

I agree that the foregoing is some evidence that Respondent tolerated misconduct, some of it quite substantial, from its employees short of termination. By way of another example, as has been noted, Qoku was absent from her post for some two hours without being suspended or terminated. And, as set forth above, Behluli had a problematic employment history which included cursing, pacing and acting in an inappropriate manner in the lobby area of the building. Notwithstanding all of the above, she was not immediately discharged. It does not escape notice that these are essentially the same behaviors that Alovic has been accused of and accordingly such evidence of disparate treatment is of more than marginal relevance.

In an effort to support its decision to terminate Alovic, Respondent attempts to paint him as a problem employee with a history of disruptive conduct. Respondent has failed to adduce sufficient probative evidence to support these contentions. As an initial matter, I note that Neiditch testified that prior to Alovic's discharge he had no involvement with issues regarding his conduct or performance. It stands to reason, however, that if Alovic had been a problem employee, Neiditch would have become aware of such difficulties. The memorandum written by Moricone to Mehmedovic regarding Alovic's termination fails to mention any prior disciplinary issues. And, as has been discussed above, Mehmedovic failed to offer any substantive testimony regarding the additional alleged incidents of misconduct outlined in her April 6 disciplinary notice. I conclude therefore, that Alovic's only prior discipline consisted of his January suspension and the history of performance problems relied upon by Respondent is a posthoc justification, a piling on of false reasons for Alovic's discharge, which supports the conclusion that it was discriminatory. *ADS Electric Co.*, 339 NLRB 1020, 1023 (2003); *Limestone Apparel*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). (A finding of pretext means that the reasons advanced by the employer did not exist or were not in fact relied upon, thereby leaving the inference of unlawful motivation.) In *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966), the court observed that if the trier of fact "finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive." 362 F.2d at 470.

In short, although I do find that Alovic engaged in some misconduct on June 19, Respondent has not met its burden of proof under *Wright Line* to come forward and show, by a preponderance of credible evidence, that it would have discharged this long-term employee absent his Union activities. The testimony of Respondent's witnesses and the other documentary evidence of what occurred on June 19 is not mutually corroborative in several salient respects. Respondent tolerated at least equally or more egregious conduct from other employees without implementing an immediate discharge. Respondent's proffered reasons have been shown to be exaggerated at the least and in clearly pretextual in other respects. Accordingly, I find that Respondent discharged Alovic in violation of Section 8(a)(1) and (3) of the Act.

4. Christopher

Respondent contends that Christopher was discharged because he returned to the building while serving a disciplinary suspension to perform unauthorized side work during that period of time. Respondent points to the fact that Christopher's suspension, alleged as an unfair labor practice, was dismissed by the Region and that dismissal was affirmed by the NLRB Office of Appeals. Respondent further relies upon the fact that, as Christopher admitted, Mehmedovic initially considered discharging Christopher rather than suspending him, but chose not to do so. Respondent argues that, had Respondent bore Christopher animus because of his union activities, the incident leading to his suspension was a prime opportunity to rid itself of him. To the contrary, I find that Mehmedovic's initial response, which was to threaten to discharge Christopher upon his first infraction in over five years of employment, is contrary to the record evidence as to how Respondent treats its other employees and demonstrates animus toward Christopher for his (by

[40] Behluli's termination letter misstates the month of her termination as March. Under all the evidence, it is apparent that she was terminated in May.

then) well known union activities.

The General Counsel contends that Respondent's proffered defense is pretextual. As an initial matter, as the General Counsel notes, Christopher was not on suspension when he performed the side job, he was actually on a scheduled day off from work. General Counsel further relies on the email in which Neiditch recommends Christopher to perform the work, albeit in his off hours.

Here, the objective and credited evidence tends to support the General Counsel's version of events. Christopher's letter of suspension clearly delineates a 2-day suspension commencing on June 24. The side job in question took place on June 26, a Saturday, and Christopher's testimony that Saturday was one of his days off was unrebutted. Christopher was in the building, not as an employee, but as an invitee of a resident, and he was allowed entry at the time. There is no evidence that any employee was spoken to or disciplined for allowing him into the building on that occasion.

I further note that Lopez's account, upon which Respondent generally relies, actually tends to support Christopher's version of events. Thus, Lopez testified that he was called by the front desk to run the freight elevator for the move. On the next day, Moricone called him into the office and asked whether he knew that Christopher had been on suspension asked him why he moved the freight elevator for Christopher when he was suspended. Notably, Lopez failed to testify that Christopher's use of the freight elevator had not been authorized; nor did he testify that Moricone criticized him for unauthorized or unscheduled use of the freight elevator. Further, the incident report Lopez completed, as instructed by Moricone, fails to mention any unauthorized use of the freight elevator on that day. Rather, in this report Lopez states that he was running the elevator, was called to the 12th floor where Christopher was waiting for a sofa and that Lopez "asked the front desk if it was OK to move 12G to 11E." I further note that Lopez was issued no discipline for unauthorized use of the freight elevator or for any other misconduct on that day. Nor was Perez, the concierge on duty that day. I further find that Respondent's failure to adduce testimony regarding this issue from Perez, it's own witness, supports an inference that her account, if truthful, would not support Respondent's contention that Christopher's use of the service elevator on behalf of a building tenant was unscheduled or unauthorized.

In sum, the evidence tends, in my view, to corroborate Christopher's testimony that the tenant told him he would make the necessary arrangements, and did in fact do so. Of course, this would make sense under all the circumstances because it was the tenant who was moving and would be obliged to obtain the necessary clearances from the building.

Christopher's termination letter references two other incidents, both of which allegedly occurred on April 29.[41] Christopher was accused of failing to attend a refresher course held at CSR's facility without contacting either Mehmedovic or Moricone with any explanation as to why he was unable to attend. Christopher testified that he had told Moricone that his son had a doctor's appointment, and was excused from attending the course. The second allegation concerns Christopher's leaving his post to go to a homeowner's unit without approval, and wandering the building. Christopher denied that this took place or he was ever spoken to about any such incident. In Christopher's termination letter, Mehmedovic asserts: "I personally spoke to you and reminded you that you are not to go upstairs in the elevator and leave your post." She further claims: [b]oth the Resident Manager and I have sat down and talked to you on several occasions. We have explained what was expected of you. "Yet again, as I am obliged to note, Mehmedovic failed to offer any testimony about these two additional infractions or any interactions she may have had with Christopher about them, or any verbal counseling of Christopher whatsoever. These are matters about which Mehmedovic clearly would have been competent to testify, as they would have been within particularly within her own personal knowledge, and her failure to do so detracts from the probity of Respondent's defense. Thus, under the facts adduced here, Christopher's assertion that he was not spoken to or disciplined for any alleged prior misconduct is essentially unrebutted. I therefore conclude that these two additional assertions of misconduct, as set forth in Christopher's termination letter, are post hoc justifications of recent invention. As has been noted, a "piling on" of unsubstantiated reasons for disciplinary action taken against an employee is evidence of unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, supra at 470.[42]

Accordingly, in agreement with the General Counsel, I find that Respondent's asserted reasons for discharging Christopher are false. Notably, where "the evidence establishes that the reasons given for the Respondent's action are pretextual –that is either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct. . . . *Rood Trucking*, 342 NLRB 895, 898 (2004), quoting *Golden State Food Corp*., 340 NLRB 382, 385 (2003) (finding it unnecessary to perform the second part of the *Wright Line* analysis).

Accordingly, I find that Respondent has failed to meet its burden to show, by a preponderance of the evidence, that it would have discharged Christopher notwithstanding his union and other concerted protected activities. Accordingly I conclude that his discharge violated Section 8(a)(1) and (3) of the Act.

[41] I credit Christopher's assertion that he never received a letter of termination.

[42] I further note that, Christopher testified that when discharging him, Moricone made specific reference to the fact that Christopher had gone to the Union to protest his suspension. I n unfair labor practice proceedings the Board will consider evidence of statements made by now-deceased individuals after subjecting such evidence to "the closest scrutiny" before deciding what weight should be given to it. See, e.g*., Metro Transport LLC*, 351 NLRB 657, 703 (2007). Here, I have decided that it is appropriate to credit, and give probative weight to Christopher's testimony regarding Moricone's comments upon his discharge.

D. The Allegedly Unlawful Lawsuit

The General Counsel argues that by filing a lawsuit against Christopher,[43] the Respondent violated Section 8(a)(1)and (4) of the act, asserting that the lawsuit lacked a reasonable basis in law or fact and was retaliatory for Christopher's seeking redress before the Board. The Respondent argues that the General Counsel has failed to establish an agency relationship permitting a conclusion that the Respondents have brought a lawsuit against Christopher, that the General Counsel has failed to show that the lawsuit lacks a reasonable basis in fact or law and was filed with retaliatory intent and that the claim is time-barred under Section 10(b) of the Act. Respondent further argues that under applicable Supreme Court precedent, the Board is not empowered to enjoin an ongoing lawsuit unless that lawsuit is preempted by Federal labor law and that the allegations of the complaint are contrary to public policy and inconsistent with the guidance of the Office of the General Counsel.

1. The agency status of Neiditch and Mehmedovic

As an initial matter, I must decide whether the lawsuit is attributable to Respondent or solely to Neiditch and Mehmedovic in their individual capacities. Respondent has argued that all of the evidence proffered in this matter establishes that Neiditch and Mehmedovic brought the defamation lawsuit on their own behalf. Respondent argues that the lawsuit relates to defamatory statements against Neiditch and Mehmedovic personally and that neither Atelier nor CSR are parties to the lawsuit. Respondent further contends that, aside from their formal titles, there is no evidence that either Neiditch or Mehmedovic acted on behalf of the Atelier or CSR in filing the lawsuit. Respondent further argues that Dweck has been retained and compensated by Neiditch.

The General Counsel contends that under traditional agency principles, the lawsuit can be attributed to Respondent even though it was brought by two individual supervisors. In support of this contention, the General Counsel relies upon *Braun Electric Co*., 324 NLRB 1, 2 (1997), where the Board delineated factors to be considered in making such a determination: whether the employer has held the supervisor as authorized to speak and act on its behalf, whether the lawsuit directly relates to an employment matter and took place on company property, and whether the supervisor engaged in other coercive conduct violative of Section 8(a)(1). The General Counsel argues that these criteria have been met here.

In general agreement with the General Counsel, I have concluded that in prosecuting the lawsuit Neiditch and Mehmedovic were acting as agents of Atelier and CSR and, as such, it is properly attributable to Respondent.

Section 2(13) of the Act provides:

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. Legislative history dictates that the Board is to apply common law principles of agency in determining who is an agent under the Act. See *Longshoremen ILA (Coastal Stevedoring Co.),* 313 NLRB 412, 415 (1993), remanded 56 F.3d 205 (D.C. Cir. 1995). In *Longshoremen ILA (Coastal Stevedoring Co.),* supra, the Board noted that "when applied to labor relations, however, agency principles must be broadly construed in light of the legislative policies embedded in the Act." Moreover, in *Shen Automotive Dealership Group*, 321 NLRB 586, 593 (1996), the Board held that the "common law principles of agency incorporate principles of implied and apparent authority." The Board has held that the burden of proof is on the party asserting that an agency relationship exists. Id.

The mere fact that neither Atelier nor CSR as institutional entities are named in or appear to support the lawsuit is not controlling. In *Nemacolin Country Club*, 291 NLRB 456, 458 (1988), enfd. 879 F.2d 858 (3d Cir. 1989) (discussed in *Braun*, 324 NLRB at 2), the Board found that the respondent, through its president and a member of the board of governors, committed a number of 8(a)(1) violations, rejecting the respondent's contention that the president and the board member were not authorized to act on their own. Consistent with the above-cited provisions of the Act and its legislative history, the Board held that a party may be bound by conduct of those it holds out to speak and act for it, even though there is no proof that specific acts were actually authorized or subsequently ratified. In finding the president an agent, the Board focused on an antiunion letter from him to employees. The Board concluded that the fact that he was the respondent's president and had signed the letter on the respondent's stationery clothed him with apparent authority sufficient to bind the respondent by his conduct.

Additionally, the Board has noted that it often finds elected or appointed officials of an organization to be agents of that organization,: "While the holding of elective office does not mandate a finding of agency *per se*, such status is persuasive and substantial evidence which will be decisive absent compelling contrary evidence." *Nemacolin*, supra at 459 (quoting *Electrical Workers Local 453 (National Electrical)*, 258 NLRB 1427, 1428 (1981)).

Here, the two individuals who filed the lawsuit are stipulated agents of Respondent: individuals who are authorized to "speak and act" for Atelier and CSR. Neiditch was designated to represent the condominium in contract negotiations with Local 32BJ. Moreover, in his capacity as president of the condominium board, Neiditch is involved in the day-to-day operations and functioning of the building. As property manager, Mehmedovic similarly is responsible for the daily supervision and discipline of the building service staff and more generally for the operation of the building.

Moreover, in the lawsuit itself, the plaintiffs are identified

[43] The allegations of the complaint allege that the lawsuit is unlawful as to two other former employees: Qoku and Behluli. However, these individuals did not testify and the record on whole is insufficient for me to make a finding as to the reasonableness of or motive in naming these former employees of Respondent in the lawsuit. Moreover, the General Counsel has represented that it is not seeking a remedy as to them. Because the status of the lawsuit as against these individuals was not fully litigated herein, I decline to consider the allegations of the complaint as it relates to these other employees.

not as two aggrieved individuals but rather in their professional capacities and as agents of Respondent:

> Plaintiff Daniel Neiditch is an individual who is the President of River 2 River Realty Inc. and the President of the Board for the Atelier Condos Building and who maintains an office at the Atelier Condos Building located at 635 West 42nd Street, New York, New York 10036.
>
> Plaintiff Sabrina Mehmedovic is an individual who is the Property Manager at the Atelier Condos Building at located at 635 West 42nd Street, New York, New York 10036.

The four corners of the text of the lawsuit further support the finding that it was brought by the plaintiffs as agents of Respondent. Thus, the initial paragraphs of the complaint set forth the following:

> The Atelier Condos Building at 635 West 42nd Street in New York City has been a desirable residence in Manhattan. The policy of the owners and management of the Building, reflected in the building rules, has been to be opposed to stays under 90 days, which still has been and is relatively lenient because in many buildings in Manhattan, the minimum lease term is for one year. In November 2008, it was decided by the Condo Board that no rental would be allowed under 90 days in order to safeguard the building's reputation and maintain standards in the building.
>
> Plaintiff Daniel Neiditch, as the President of the Atelier Condos Building at 635 West 42nd Street in New York City, and Plaintiff Sabrina Mehmedovic, as Property Manager of the Atelier Condos Building, have diligently exercised their respective responsibilities in the operations of the 635 West 42nd Street building; and, in the course of doing so, they have cracked down and enforced the Condo Board's decision not to allow renters for less than 90 days in accordance with building rules. Plaintiff Daniel Neiditch and Plaintiff Sabrina Mehmedovic also have cracked down and enforced the building rules against occupants engaging in business activities in the building. In these efforts, Plaintiff Daniel Neiditch and Plaintiff Sabrina Mehmedovic had the full working cooperation of Robert E. Moricone, Jr., the Resident Manager of the Atelier Condos Building who had held that position many years. These efforts, however, made unhappy certain owners, who were desirous of renting their condo apartments for less than 90 days and running businesses in the building. These efforts also made unhappy certain now former employees, such as Defendants Laura Qoku and Blerta Behluli, who were fired for neglecting their job duties.

From the foregoing, it is apparent that the state court complaint, by its terms, references the internal dispute occurring among the owners and residents relating to short term rentals, the damage such practices has on the reputation and standards of the building, and the unhappiness of certain owners who sought to avoid the rules imposed by the Board (of which Neiditch was president) to curtail such activities.

The communications issued by Mehmedovic and Neiditch relating to the web postings provide further evidence that the lawsuit was undertaken by them as agents of CSR and Atelier, and not simply in their individual capacities. For example, Mehmedovic cautions representatives of CSR that they should be "concerned" about the postings. More tellingly, in his letter to Atelier residents, Neiditch makes references to the effect of the alleged defamation as follows:

> The lies/slander written hurt the reputation of the building, property values, its workers and our residents.
>
> . . . .
>
> This despicable website has come in a time of my friend/our beloved Robert's passing (coming out on the day of his death) in order to stir propaganda to discredit Sabrina, Cooper Square, the board and myself in order for those responsible to gain passage from illegal business in our home.
>
> . . . .
>
> We also continually brand our building's name and image to preserve the stature and property integrity. My being a real estate professional has also given me the ability to spot real estate fraud and other illegal broker activities. We have caught numerous apartments doing illegal activities wit their unit. The board, staff, Sabrina and I have personally caught them on our own personal free time to ensure all our safety. This is what has been the cause of all these false rumors and allegations: so the real fraudulent people can continue to do whatever they like to without regard for anyone else. I have a vested interest to all home owners to keep prices high and common charges low.
>
> . . . .
>
> We appreciate all of the support of the hundreds of owners who have emailed the board and me and we will continue to make you proud of the hard work we put in. We cannot control people making up lies and these false allegations will be in the hand of the law.

Moreover, the sole basis for including Christopher in the state court action was by virtue of his employment relationship with Respondent. Otherwise, he would have had no nexus to any of the events forming the backdrop for the lawsuit. Further, as I have found above, both Neiditch and Mehmedovic engaged in other conduct otherwise violative of Section 8(a)(1) and (3) directed specifically toward Christopher, demonstrating their animus toward his protected conduct.

Respondent points to testimony that Dweck was retained by Neiditch and either has, or will be paid by him. However, it does not escape notice that there was a lot of "wiggle room" in the manner in which questions on this point were posed to Neiditch. In this regard, I note that Neiditch never testified that he actually paid Dweck specifically for his representation in the lawsuit; nor did Dweck testify that he has been so paid. Since Dweck has, since the filing of the lawsuit, taken virtually no action to prosecute it, not even to commence discovery, I tend to think that he has not been compensated for his services in this regard. As the General Counsel has noted, at the time

Dweck was representing Neiditch and Mehmedovic in the lawsuit, he was also acting in a representative capacity for Atelier and CSR before the NLRB.

With regards to Dweck's testimony, I find that he demonstrated a failure of knowledge with respect to this lawsuit which leads me to question its overall accuracy. For example, Dweck testified that after he failed to appear for a court-ordered conference in June 2010, the lawsuit was "marked off" the calendar, and during cross-examination specifically denied that it had been dismissed. In fact, Judge James' order states that the case is dismissed for the failure of the plaintiffs' attorney to appear. Dweck, a self-described general practice practitioner, does not appear from the record to have expertise in matters pertaining to defamation law, leading to the inference that he was selected to prosecute the lawsuit based upon his ongoing business relationship with Atelier and CSR.

Neiditch appeared similarly uninformed about the lawsuit. When asked by counsel for Respondent about the status of the initial filing, Neiditch replied, "It is my understanding that it was taken off and the status of it is still pending." When asked if there was new litigation in the matter, he responded: "No, there's no new litigation. I understand that there was an attorney representing [Christopher] but he, by accident, reopened it instead of reissuing it. It's the same case. The case never changed." I find that this apparent unfamiliarity with the status of the case, runs contrary to Neiditch's claim that the lawsuit was brought and is being prosecuted by him personally.

In conclusion, I find that there is simply no "compelling contrary evidence" that Neiditch, as an elected president of the condominium board, or Mehmedovic as the highest-ranking on site manager were not acting in an agency capacity with regard to the lawsuit against Christopher. Accordingly, I conclude that the General Counsel has met its burden of establishing that Neiditch and Mehmedovic were acting as agents of Respondent in the filing and continued prosecution of the lawsuit.

2. The lawsuit is not barred by the applicable statute of limitations

It is well settled that Section 10(b) is an affirmative defense and the party asserting such a defense bears the burden of proof. See *Leach Corp*., 312 NLRB 990, 991, 992 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995). It is equally well settled that this affirmative defense must be pled in the answer or raised before the hearing closes. Because Respondent's 10(b) defense was not pled in the answer or articulated by Respondent during its opening statement at the hearing, and was not raised by Respondent prior to the filing of its post hearing brief, this defense was not raised in a timely manner and, therefore, has been waived.[44] *Harco Trucking, LLC*, 344 NLRB 478, 479 (2005); *Dayton Newpapers, Inc*., 339 NLRB 650, 653 fn. 8 (2003), enfd. in part 402 F.3d 651 (6th Cir. 2005).

Moreover, even if I were to conclude that Respondent's Section 10(b) defense had not been waived, I would find Respondent's contentions to lack merit. Pursuant to Section 10(b) of the Act, a violation of the NLRA cannot be found, "which is inescapably grounded in events predating the limitations period." *Machinists Local 1424 v. NLRB*, 362 U.S. 411, 422 (1960). However, events outside the 10(b) period can be used to shed light on critical events within the 10(b) period. Id. at 416. The crucial distinction between these principles is that the Board may not give "independent and controlling weight" to the pre-10(b) evidence. Id. at 417.

Despite Respondent's assertions to the contrary, the second lawsuit, which was commenced in June 2010, is not a mere continuation of the initial lawsuit, and does not require me to give "independent and controlling weight" to events outside the limitations period. As noted above, there are several differences between the two causes of action including the named plaintiffs and the named defendants. Most importantly, the June 2009 lawsuit was dismissed by the court in June 2010. A court order issued so declaring. Thereafter a new lawsuit naming only three former employees and 10 other anonymous defendants was filed. The lawsuits have different index numbers. In this regard, I note that Dweck testified that he could have attempted to reinstate the original cause of action, but due to a number of factors such as cost, difficulty, the initial naming of defendants who cannot be properly sued for defamation and the looming expiration of the applicable statute of limitations, he determined that filing a new lawsuit was the most expeditious course of action.

Based upon all the factors here, I conclude that Respondent has failed to meet its burden to show that the lawsuit filed by Dweck in June 2010 was a mere continuation of the prior lawsuit rather than a separate and distinct legal action. Accordingly, the charge filed by Christopher alleging that the lawsuit was unlawful, filed on August 12, 2010, is timely.[45]

[44] Respondent's answer raises four affirmative defenses: the complaint fails to state a claim upon which relief may be granted; the charging parties engaged in unprotected conduct; the allegations in the complaint are barred by laches; and General Counsel's pursuit of portions of the complaint is contrary to Federal law and an abuse of process. While it could be argued that Respondent adduced evidence going toward a 10(b) affirmative defense, in particular to support its contention that the second lawsuit was merely a continuation of the first, the fact remains that Respondent did not specifically argue the applicability of this defense during its opening statement or at any other time during the course of the hearing. In fact, the only reference in the record to Sec. 10(b) occurred during the General Counsel's opening statement. The General Counsel, of course, is neither obligated nor empowered to raise affirmative defenses for a respondent.

[45] Relying on *Geske & Sons*, 317 NLRB 28, 32 (1995), counsel for the General Counsel further argues that even if one were to assume that the June 2010 lawsuit is a continuation of the prior one, the mere maintenance and prosecution of an unlawful lawsuit amounts to a continuous violation of the Act. Thus, General Counsel argues that the fact that the initial lawsuit was filed more than 6 months prior to Christopher's unfair labor practice charge is of no moment. I note however, that in *Geske*, the administrative law judge relied on the fact that that the applicable 10(b) period included the last 3 days of a 9-day state-court hearing, thus concluding that the charge timely encompassed the respondent's conduct in maintaining and prosecuting the lawsuit. In my view, this distinguishes *Geske* from the instant matter.

3. Respondent's constitutional and public policy arguments

In its posthearing brief, Respondent has argued that under *Bill Johnson's*, the Board is not empowered to enjoin an ongoing lawsuit unless that lawsuit is preempted by Federal labor law. In support of these contentions, Respondent relies on *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244–245 (1959). Respondent's contentions in this regard constitute a misapprehension of *Bill Johnson's* and the applicability of *Garmon* to the instant case.

Contrary to Respondent's apparent assertions, *Bill Johnson's* holds that "it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with a retaliatory motive." 461 U.S. at 744. Respondent seemingly has confused the Court's clear holding in this regard with commentary set forth in so-called "footnote 5" of the *Bill Johnson's* decision which describes an exception to the above-expressed rule. There, the Court stated:

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits.

461 U.S. at 738, fn. 5.

The Court, however, did not limit the Board's authority to enjoin state court lawsuits to those that are either illegal or preempted under Federal labor law. *Garmon*, relied upon by Respondent, is inapposite to the circumstances here. There, the Court deals with the preemption doctrine—the issue of protecting the primary jurisdiction of the National Labor Relations Board by displacing state court jurisdiction over conduct which is arguably encompassed by Section 7 or Section 8 of the Act. Thus, when conduct is arguably violative of the Act, state rulings and actions must defer to the "exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 245. Such authority has no relevance to the instant case where the General Counsel has not contended, and no party has argued, that the state court defamation lawsuit falls within the parameters of "footnote 5." The instant case was not litigated on that theory and the evidence does not support the necessary conclusion that the controversy underlying the state court defamation lawsuit was one that is similar in any fundamental respect to one that could have been presented to the Board. See *Operating Engineers v. Jones*, 460 U.S. 669, 682–683 (1983); *Sears, Roebuck & Co., v. Carpenters*, 436 U.S. 180, 187 (1978).

Respondent further argues that the General Counsel has failed to follow its own internal guidelines for the investigation of allegedly retaliatory lawsuits, citing memoranda from the Office of the General Counsel. In particular, Respondent cites to GC Memo 02-09 which, in part, directs the Regions to defer action on allegations of unfair labor practices relating to ongoing lawsuits when they are in the early stages of litigation. Of course, the decision of whether such guidance should obtain in the instant case is an internal matter within the discretion of the General Counsel. Moreover, memoranda issued by the General Counsel do not constitute precedential authority and are not binding on the Board. See *Fun Striders*, 250 NLRB 520, 520 fn. 1 (1980) (advice memorandum does not constitute precedential authority).

In short, I conclude that there is no constitutional impediment, or overarching consideration of public policy which precludes me from considering the issues relating to the defamation lawsuit on their merits.

4. The Lawsuit is unlawful

The General Counsel has alleged that the state court defamation lawsuit filed against Christopher violates Section 8(a)(1) and (4) of the Act. Section 8(a)(4) of the Act provides that it is an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." Conduct violating this provision discourages employees' Section 7 rights and derivatively violates Section 8(a)(1) of the Act. In addition, an unlawful state court lawsuit reasonably tends to chill the exercise of employees' Section 7 rights and therefore independently violates Section 8(a)(1).

In *Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731 (1983), the Court articulated a standard for evaluating an alleged retaliatory lawsuit. For ongoing lawsuits (as is the case here), the Court held that the Board may, consistent with the First Amendment, only halt prosecution of an ongoing lawsuit if it lacks a reasonable basis in fact or law and was brought with a retaliatory motive. Id. at 748–749. In *Bill Johnson's*, the Court ruled that while the Board's inquiry need not be limited to the bare pleadings, the Board could not make credibility resolutions or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge. However, while "genuine disputes about material historical facts should be left for the state court, plainly unsupportable inferences from the disputed facts and patently erroneous submissions with respect to mixed questions of fact and law may be rejected." 461 U.S. at 746 fn. 11. Further, the Board may not determine "genuine state-law legal questions." These are legal questions that are not "plainly foreclosed as a matter of law or otherwise frivolous." Id. at 746. Thus, a lawsuit can be deemed baseless only if it presents unsupportable facts or unsupportable inferences from facts, or if it depends upon "plainly foreclosed" or "frivolous" legal issues.

In *BE& K Construction Co. v. NLRB*, 536 U.S. 516 (2002), the Court held that the First Amendment protects reasonably based lawsuits even if filed with a retaliatory motive. The Court noted that the right to petition the government includes the right of access to the courts. It held that, for purposes of protecting legitimate petitioning, the proper focus of the inquiry is the reasonableness of the petition from the perspective of the plaintiff at the time the lawsuit was filed. 536 U.S. at 532. On remand, in *BE& K*, 351 NLRB 450, 450 (2002), the Board held that "the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or is completed, and regardless of the

motive for initiating the lawsuit." The Board also held that "a lawsuit lacks a reasonable basis or is 'objectively baseless' if 'no reasonable litigant could realistically expect a success on the merits.'" Id. (quoting *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, 508 U.S. 49, 60 (1993)). In applying this standard, the Board has found that it will be guided by the Court's discussion, in *Bill Johnson's*, of the reasonable-basis inquiry in the context of ongoing suits. See *Ray Angelini Inc.*, 351 NLRB 206 (2007) (quoting *Bill Johnson's*, 461 U.S. at 745, 747).

a. The lawsuit lacks a reasonable basis in fact

In *Milum Textile Services*, 357 NLRB No. 169 (2011), the Board, among other determinations,[46] remanded to the administrative law judge the issue of whether a complaint filed in Federal district court alleging five causes of action,[47] which was thereafter voluntarily discontinued, had been brought in violation of Section 8(a)(1). In doing so, the Board discussed what the General Counsel must show to establish, in the first instance, that a lawsuit was baseless. Id. slip op. at 6–7.

As an initial matter, the Board made clear that the General Counsel has the burden of proof that the lawsuit at issue is baseless. The Board noted that at the complaint stage, where a lawsuit has not already been litigated:

> [T]he question is whether a plaintiff, with the factual information in its possession and whatever additional factual information a reasonable potential litigant would have acquired prior to filing, would reasonably have believed it had a cause of action upon which relief could be granted. This does not mean that a plaintiff must possess all the evidence necessary to prove its case at the time of filing. Some necessary evidence is not within the possession or control of the plaintiff and cannot be acquired without discovery. . .

Id.

Here, because no action has been taken on the lawsuit and there are no contemporaneous affidavits or other documentary evidence attached thereto, the complaint constitutes the entire evidentiary record before the state court in this matter. There is no state court determination as to the adequacy of the pleadings or going toward any evidentiary dispute. Accordingly, in analyzing whether the lawsuit was reasonably based, my conclusions are necessarily based upon the four corners of the complaint as supplemented by the evidence which has been adduced by the parties in the hearing held before me.

For a number of reasons, discussed below, I have found that as to the filing of the instant lawsuit against Christopher, the General Counsel has met its burden of proof that the lawsuit lacked a reasonable basis and that Respondent has failed to come forward with any evidence to suggest that the lawsuit raises any genuine or material issue of fact or that it could have acquired such evidence through discovery.

As an initial matter, I look toward the letter Neiditch sent to fellow owners at the Atelier, shortly after, and in response to, the allegedly defamatory comments which suggests that legal proceedings will be commenced. In this letter, there is a reference to "former employees who recently let a FBI wanted criminal into the building" and thereafter to "[f]ormer disgruntled employees fired for helping this illegal scam operations [sic], [who] are also involved and had been taking bribes to help facilitate illegal rentals to take place for these home owners/brokers to commit fraud and hotel stays." Here, there is no contention and no evidence that Christopher was known to have been involved with, or had been disciplined for, letting criminals enter the building or taking bribes or otherwise participating in the facilitation of "hotel-style" rentals. As Respondent has alleged, Christopher was discharged only for returning to the building during a suspension, to perform unauthorized work for a tenant (one who does not appear to be involved in this intra-building dispute.) Accordingly, I conclude that Neiditch initially failed to identify Christopher as someone connected to his dispute with those who posted the allegedly defamatory remarks. Moreover, Respondent has failed, subsequently, to come forward with any evidence that Christopher was so involved, or that Respondent had any reason to think he was.

Moreover, the four corners of the complaint fails to establish that Respondent, or Neiditch and Mehmedovic, as its agents, had any knowledge that Christopher authored, edited, sponsored or ratified any postings referred to in the lawsuit.

In particular, I note that in the section of the complaint containing allegations common to all causes of action, which is set forth above, the intra-building dispute over "hotel-style" rentals is clearly referenced as are the efforts of the plaintiffs to restrict them. Certain discharged employees are named as disgruntled parties, as follows: "These efforts, however, made unhappy certain owners, who were desirous of renting their condo apartments for less than 90 days and running businesses in the building. These efforts also made unhappy certain now former employees, such as Defendants Laura Qoku and Blerta Behluli, who were fired for neglecting their job duties." Again, Christopher is not named as someone with any connection to this underlying dispute. I find this to be a telling omission and admission.

Further, the initial lawsuit was filed against various internet service providers, [48] one renter, one owner, three former em-

[46] In particular, the Board agreed with the judge that the respondent's motion for a TRO was unlawful, and that the respondent had committed other violations of the Act unrelated to the TRO or the discontinued lawsuit.

[47] The five causes of action alleged in the complaint included illegal secondary boycott, intentional interference with economic relations, intentional interference with prospective economic advantage, libel, and fraud.

[48] In this regard, the lawsuit was apparently ill conceived. I take administrative notice of Section 230 of the Communications Decency Act [47 USC Section 230] which grants interactive online services broad immunity from certain types of liability—including defamation—stemming from content created by others. In addition, naming the Estate of Robert Moricone as plaintiff was legal error as well. Under New York law, an estate is not able to sue for defamation of the deceased. See *Rose v. Daily Mirror, Inc*., 284 N.Y. 335, 337–338 (1940).

ployees and 20 fictitious defendants. There was no specific attribution of any defamatory statement to any particular individual. The second lawsuit named only the three discharged employees, who at the time were the subjects of an outstanding unfair labor practice complaint, and 10 fictitious defendants. [49] Similarly, in this new lawsuit there was no attribution of any particular statement to any particular individual. There is no indication that the plaintiffs have made any attempt toward discovery at any relevant time; notwithstanding the decision to name 10 unknown persons. Thus, Christopher has not been specifically alleged to be the author of any of the allegedly defamatory statements set forth in the complaint and there are no specific statements otherwise attributable to him as set forth in the testimony or other evidence adduced at hearing. Nor has there been any offer of proof as to what discovery in this case might reveal or uncover. See *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1376 (7th Cir. 1997), cert. denied 522 U.S. 808 (1997), enfg. 317 NLRB 28 (1995) (Board may enjoin prosecution of a state law suit prior to discovery where the respondent provides no evidentiary basis for the lawsuit and fails to describe what evidence it expects to obtain through discovery.).

As the General Counsel notes in his posthearing brief:

> Respondent's only evidence attributing Christopher to the defamatory statements is Neiditch's testimony that one of the posts had Christopher's name on it. Neiditch did not provide any documentary evidence to corroborate this assertion. In addition, the [state court] complaint does not assert that Christopher's name appeared on one of the postings. If Christopher's name appeared on an allegedly defamatory posting, and he is being charged with authoring same, it is inexplicable why Respondent would not include the statement in their complaint or allege that in its complaint.

Neiditch's testimony, referred to above by the General Counsel, was so nonspecific and vague that it convinced me that he had never actually seen any such defamatory material. Moreover, the statements referring to Neiditch and Mehmedovic which have been alleged in the complaint are startling. It stands to reason that if Neiditch (or Mehmedovic for that matter)[50] had, in fact, seen any such posting ostensibly authored by Christopher, or any other particular individual, they would have recalled it. This apparent lack of recollection, coupled with Neiditch's failure to produce any statement attributable to Christopher (notwithstanding any issue of whether he was compelled to produce same pursuant to subpoena) points to the conclusion that such a statement does not exist.

I further note that Respondent has failed to produce documentary evidence which would relate to the investigation of the lawsuit or would establish that Christopher authored or authorized any allegedly defamatory statement. The only document produced by Respondent was an email chain where various agents of Respondent react to the websites and seek a plan of action in response thereto. Based upon this failure to produce clearly relevant documents: those which had been sought by the General Counsel's subpoena and which Respondent was under legal compunction to produce, I conclude that either that they do not exist, or that to the extent they do, such evidence would not support Respondent's contentions here. Neither Neiditch nor Mehmedovic offered any testimony which would establish that either of them, or any other agent of Respondent, conducted an investigation of whether Christopher was involved in authoring or disseminating any statement at issue in the state court complaint. Moreover, in her email to various representatives of CSR, Mehmedovic identifies two other individuals whom she believed to be culpable. Thus, from the evidence as a whole I conclude that little, if any, investigation took place and Respondent has no knowledge that Christopher participated in any allegedly defamatory commentary in any way whatsoever. See *Diamond Walnut Growers, Inc.*, 312 NLRB 61 (1993) (retaliatory libel suit against a union involving a letter calling for a boycott of the employer was baseless because there was no proof that the union had sent the letter.)

I credit Christopher's testimony that he did not author the statements set forth in the complaint and that did not have access to or make use of the web sites or distribute such material on the internet. In its post-hearing brief, Respondent has argued that any such resolution of conflicting evidence is improper: "Christopher can deny those allegations as he has in the instant matter but his denials are of no moment. It is not for this forum to adjudicate whether the claim is reasonably based." While I disagree with Respondent's apparent contention that I am not authorized to make certain credibility resolutions to determine whether the defamation claim is reasonably based, I am cognizant that the Supreme Court has cautioned that "The Board's reasonable basis inquiry must be structured in a manner that will preserve the state plaintiff's right to have a state court jury or judge resolve genuine material factual or state-law legal disputes pertaining to the lawsuit." *Bill Johnson's*, supra at 749.

Nevertheless, as the administrative law judge presiding over the instant matter, I am not only authorized, but required, to assess the credibility of witnesses appearing before me.[51] The history of *Bill Johnson's* and its progeny fails to suggest that an administrative law judge's responsibilities are abridged pursuant to such claims. In considering similar arguments, the Sev-

[49] Under New York state law, a complaint for defamation must allege that the defendant published the defamatory words as well as the time, manner and persons to whom the publication was made. See e.g. *Murphy v. City of New York*, 59 A.D. 301, 301 (1st Dep't 2009) (dismissing defamation complaint where "it failed to establish all the elements of defamation, inasmuch as the plaintiff did not allege the time, the manner and the persons to whom the publication was made *. . . nor did he identify the person who made it*.") (emphasis supplied); *Simpson v. Village Voice, Inc.,* 58 A.D. 421(1st Dep't. 2009), leave to appeal denied 12 N.Y.3d 710 (2009). However, this is a matter of state law outside my purview and which, under *Bill Johnson's* and its progeny, should be left for a state court to decide.

[50] Mehmedovic offered no testimony about the lawsuit whatsoever.

[51] As the Supreme Court has noted: "Weight is given to the administrative law judge's credibility determinations because she sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records." *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962).

enth Circuit has noted: "In order to carry out its mandate under *Bill Johnson's* to determine whether a lawsuit is baseless, the Board must examine the [state court] plaintiff's evidence to determine whether it raises any material questions of fact." *Geske & Sons, v. NLRB,* 103 F.3d 1366, 1376 (1997). With regard to the role of the ALJ in particular, that court noted the following: "It is the duty and the prerogative of the ALJ to choose between conflicting evidentiary submissions." Id at 1375. This has been the position taken by the Board. In particular, in *Milum*, supra, slip op. at 7, the Board panel majority noted as follows:

> In order to determine if the General counsel has carried [its] burden a judge must determine the elements of the causes of action that the General Counsel has placed at issue and then evaluate the evidence offered by the General Counsel to prove that the Respondent did not have, and could not reasonably have believed it could acquire through discovery or other means, evidence needed to prove essential elements of its causes of action and consider also evidence offered by the Respondent to prove to the contrary, including evidence in the nature of a statement under Fed. R. Civ. P. 56(d).[52]

I further note that in his dissent in *Milum*, Member Hayes, citing to the testimony of the respondent's president, (Milum), about why he filed the lawsuit noted that: "The General Counsel did not adduce evidence undermining Milum's credibility, and the judge did not question his credibility." 357 NLRB No. 69, slip op. at 13. On the basis of the above-cited authority I conclude that credibility determinations are well within my purview in the context of the instant case to the extent they are directed toward determining whether, under *Bill Johnson's* and its progeny, the lawsuit has a reasonable basis, i.e. whether there exists a genuine issue of fact or law to be further determined in state court proceedings.

In short, I find the evidence on whole establishes that the lawsuit, as against Christopher, lacked a reasonable basis. There is no genuine material factual basis for alleging that he is connected in any way with any allegedly defamatory remark. He is not named in any communication disseminated by Mehmedovic or Neiditch about the websites or in connection with any particular incident of alleged defamation. There is no evidence that he has any connection to or involvement in the intra-building dispute over hotel-style rentals and the animus that engendered among Atelier residents and members of the Board. Moreover, neither Respondent, Neiditch nor Mehmedovic has come forward with any credible testimony or other evidence linking Christopher to any of the websites, postings or underlying circumstances surrounding the state court complaint. Accordingly, assessing the elements of the causes of action at issue in the state court lawsuit here, I conclude that the General Counsel has established that Respondent did not have, and could not reasonably believe it could acquire through discovery, the evidence required to prove the essential elements of its cause of action against Christopher. *Milum*, supra, slip op. at 7.

b. The lawsuit was brought with a retaliatory motive

As noted above, however, that does not end the inquiry for it must also be established that the lawsuit was brought with a retaliatory motive.

Under all the circumstances here, I conclude that Respondent brought this lawsuit with a motive to retaliate against Christopher for participating in an investigation of charges filed before the NLRB and for other conduct protected by the Act.

In arguing that the General Counsel has failed to prove that lawsuit had a retaliatory motive, Respondent argues that Christopher's charge of unlawful discrimination was not filed until August 26, approximately 1 month after the original defamation lawsuit was brought in July 2009. While this is true, it is also the case that Christopher was known to have engaged in Union activities, to which Respondent had shown animus. Christopher had been discharged for this conduct in June, just weeks prior to the initiation of the lawsuit. Moreover, by the time the initial lawsuit was filed, Qoku had already filed charges against Respondent alleging unlawful interrogations of and threats to employees for their activities in support of the Union, among other things, and Christopher had been the subject of such unlawful conduct. In any event, even if one were to accept Respondent's argument at face value, this does not begin to excuse why Christopher was named in a second lawsuit—one that was filed after he was the subject of an outstanding NLRB complaint.

Respondent further argues that General Counsel is mistakenly relying upon the "procedural failing of Plaintiff's counsel for allowing the case to be marked off the calendar by failing to attend a June 2010 court conference." In its post-hearing brief, Respondent contends that "had Dweck simply taken a default judgment against Christopher in March 2009 or appeared at a routine court conference in June 2009, there would be no *Bill Johnson's* claim in this case." I surmise that this argument relates back to Respondent's contention that Christopher's claims are time barred, an assertion that I have rejected. In any event, it is an argument based upon speculation of what might have or could have occurred, and is not rooted in evidence of what actually transpired. Similarly, Respondent argues that the "baselessness" of the General Counsel's theory is highlighted by the fact that Alovic was not named in the lawsuit, even though a complaint on his discharge was issued in February 2010. As Respondent argues: "If there was retaliatory intent in the refiling, one would fully have expected the refilled lawsuit to have included Alovic. It did not." As an initial matter, this appears to me to be an inadvertent apparent concession that Respondent bore Alovic animus due to his protected conduct.

[52] Rule 56(d) provides as follows:

WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

1. defer considering the motion or deny it;
2. allow time to obtain affidavits or declaration or to take discovery;
3. issue any other appropriate order.

In any event, Respondent's argument is, again, mere speculation. I decline to draw the inference Respondent suggests based upon what did not occur, absent more.

In *Allied Mechanical Services*, 357 NLRB No. 101, slip op at 10–11 (2011), the Board considered what type of evidence will suffice to prove that a baseless lawsuit was brought with a retaliatory motive. The Board held that retaliatory motive may be inferred from, among other things, the facts that the lawsuit was filed in response to protected activity; that the employer-plaintiff bore animus toward the defendant and particularly toward his protected activity; and that the lawsuit obviously lacked merit. Id.

As described above, the record reflects a prior history of support for a union which the Atelier Board considered less expensive in terms of its contractual obligations. While this background is not dispositive, it does inform this discussion. In addition, Christopher was a prime organizer for Local 32BJ, who was unlawfully interrogated and then unlawfully discharged. By the time the second lawsuit was filed, Christopher had been the subject of an outstanding unfair labor practice complaint and the two defendants who were residents at the Atelier, individuals who arguably were far more likely to have some involvement with the underlying dispute prompting the allegedly defamatory statements at issue, had been dropped from the lawsuit.

I find that the lawsuit's obvious lack of merit as regards Christopher, outlined above, is further evidence of Respondent's retaliatory motive. Moreover, the complaint seeks $190 million in damages and in this regard it cannot escape notice that the only specifically named defendants are three discharged building service employees. Despite this extraordinary demand for damages, Respondent has offered no proof, and not even an indication of what, if any, harm it suffered as a result of the alleged defamation. In *Bill Johnson's* the Court recognized that "the chilling effect of a State lawsuit on an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief." 461 U.S. at 741. The Board has held that an employer's request for punitive damages in a suit against a union can itself be evidence of a retaliatory motive. *Diamond Walnut Growers*, 312 NLRB 61 (1993); see also *Summitville Tiles, Inc*, 300 NLRB 64, 66 (1990); *H.W. Barss Co.*, 296 NLRB 1286, 1287 (1989). In *BE &K*, the Court majority left open the question of whether a showing of retaliatory motive such as the fact that the suit would not have been filed "but for" a motive to impose litigation costs on the defendant, regardless of the outcome of the case, would suffice to condemn even a reasonably based lawsuit. 536 U.S. at 536–537. See also *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.2d 1097 (9th Cir. 1995) (enfg. 312 NLRB 61); *Phoenix Newspapers, Inc*., 294 NLRB 47, 49–50 (1989); *Machinist Lodge 91 (United Technologies)*, 298 NLRB 325, 326 (1990), enfd. 934 F.2d 1288 (2d Cir. 1991) (request for excessive punitive damages can be evidence of retaliatory motive). Here, the plaintiffs have been represented throughout by counsel who, no doubt, would have realized that such large sums of moneys sought as damages would have had no possibility of being granted, or collected, even assuming that there was any merit to the lawsuit's contentions. Moreover, the evidence shows that Christopher, facing a demand for damages that he could not conceivably begin to meet, was obliged to seek assistance in filing a pro se answer to the lawsuit and go to the court to defend himself—notwithstanding the fact that the plaintiffs' attorney declined to make an appearance at the time. Based upon the foregoing, I conclude that Respondent brought this action against Christopher with the intent to use (and abuse) court processes, regardless of any possible outcome, with a retaliatory motive.

As has been discussed above, the timing of adverse action taken against an employee has been found to reflect unlawful (or retaliatory) motive. Here, such timing is further evidence of the lawsuit's retaliatory nature. Christopher was named in the first lawsuit shortly after his unlawful discharge. The instant lawsuit was filed in June 2010, one year after any allegedly defamatory comments had been disseminated and despite the fact that the websites had been shut down immediately after the initial lawsuit was filed in 2009. At the time the second lawsuit was filed, Christopher was no longer an employee and had not been employed by Respondent for one year: the only nexus linking Christopher to Respondent was the extant NLRB complaint alleging various unfair labor practices.

Taking all factors into account: the timing of Respondent's state court lawsuit; the meritless nature of the complaint allegations insofar as they relate to Christopher; the request for excessive damages; Respondent's history of animus toward Local 32BJ; the independent violations of Section 8(a)(1) found herein; the unlawful discharges and the other evidence and testimony adduced in this record lead me to the conclusion that Respondent filed this lawsuit with a retaliatory motive under *Bill Johnson's* and its progeny. Accordingly, I find that the state court lawsuit filed by Neiditch and Mehmedovic, as agents of Respondent, against Christopher was both baseless and retaliatory under Supreme Court and Board law, in violation of Section 8(a)(1) and (4) of the Act.

CONCLUSIONS OF LAW

1. Atelier Condominium and Cooper Square Realty (Respondent) are joint employers and are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act

2. Local 32BJ, SEIU is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following conduct, Respondent violated Section 8(a)(1) of the Act.

(a) Interrogating employees about their union activities and the union activities of others.

(b) Threatening employees with unspecified reprisals if they supported the Union.

4. By discharging Nazmir Alovic and Sebastain Christopher, Respondent violated Section 8(a)(1) and (3) of the Act.

5. By filing and maintaining a baseless and retaliatory lawsuit naming Christopher as defendant, Respondent violated Section 8(a)(1) and (4) of the Act.

6. The unfair labor practices described above affect com-

merce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent, having discriminatorily discharged Alovic and Christopher, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). Respondent will also be ordered to withdraw its state court lawsuit against Christopher, reimburse him for any costs associated with that lawsuit and refrain from instituting or pursuing any state court lawsuit against employees that lacks a reasonable basis and is motivated by an intent to retaliate against participation in an investigation of unfair labor practice charges filed before the National Labor Relations Board or other activity protected by Section 7 of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[53]

ORDER

The Respondent, Atelier Condominium and Cooper Square Realty, as joint employers, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their Union activities and the Union activities of others.

(b) Threatening employees with unspecified reprisals if they supported the Union.

(c) Discharging employees for engaging in union or other concerted, protected activities.

(d) Instituting or maintaining any baseless and retaliatory lawsuit to retaliate against employees for participating in an investigation before the National Labor Relations Board or other concerted protected activities.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed hem by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Nazmir Alovic and Sebastain Christopher full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Nazmir Alovic and Sebastain Christopher whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Withdraw its state court lawsuit against Sebastain Christopher and compensate him for any costs incurred in connection therewith.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[54] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 2009.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 10, 2012

[53] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[54] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities or the union support and activities of other employees.

WE WILL NOT threaten you with unspecified reprisals for your union or concerted protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 32BJ, SEIU or any other union.

WE WILL NOT institute or maintain a baseless and retaliatory lawsuit to retaliate against you for participating in an investigation of unfair labor practice charges filed before the National Labor Relations Board or other concerted protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Nazmir Alovic and Sebastain Christopher full reinstatement to their former positions or, if those positions no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Nazmir Alovic and Sebastain Christopher whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Nazmir Alovic and Sebastain Christopher, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL withdraw our state court lawsuit against Sebastain Christopher and compensate him for any costs incurred in connection therewith.

ATELIER CONDOMINIUM AND COOPER SQUARE REALTY, AS JOINT EMPLOYERS